82-5714

NO. 82 -

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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 19

MICHELLE DYER, a minor by RUBY DYER
her parent and natural guardian

Appellants

v.

LOWER BUCKS COUNTY HOSPITAL

Appellee

On Appeal from the Supreme Court of Pennsylvania, No. 233 E.D. Allocatur Docket 1982

JURISDICTIONAL STATEMENT

EDWIN D. POPKIN

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ATTORNEY FOR APPELLANTS

QUESTIONS PRESENTED

Historically in Western Civilization under the Common Law Doctrine of Paterfamilias a minor child was considered as belonging to or being the property of the father. Consistent with this premise, the Common Law assumed that the father had the right to the property and services of his children, including any cause of action which existed on behalf of his children. As such, it was perfectly logical to conclude that the father had the right to allow any cause of action of his children to lapse by his inaction in failing to perfect same within a statutory limitation period.

The rights of children have, however, advanced since early common law and a child is no longer the property of his parent; instead, it is recognized that children have their own independant rights which are subject to constitutional protection. Along with the foregoing advances with respect to children's rights has come the recognition by most jurisdictions within this country that a child's right to sue, despite its intangible nature, is a property right and that a child cannot be deprived of that right through inaction of a parent or guardian during the period of time when the child himself is barred from commencing the action in his own name because of his minority.

A few states, however, still do not recognize the independant constitutional right of a child with respect to a cause of action and adhere to the ancient common law view that parents have the right to control, even to the point of dissipating, any cause of action of their children. Pennsylvania is one of these states. Pennsylvania Statutory Law contains a provision of general application which provides that

Statutes of Limitation are not tolled by minority, regardless of whether or not the minor has a competent parent or guardian to protect his or her interests. Curiously, however, despite this general statutory provision, in certain specific areas of the law which Pennsylvania has borrowed from other jurisdictions, such as No-Fault Automobile Insurance Law, Pennsylvania does have a statutory provision tolling the Statute of Limitations during minority.

Pennsylvania's foregoing position raises two serious constitutional questions in the context of the instant medical malpractice case. In this case, minor Plaintiff, Michelle Dyer suffered permanent and disfiguring burn injuries to her chest area at the time of her birth as a result of the clear negligence of the Defendant, Lower Bucks Hospital. Michelle's subsequent malpractice action was dismissed, however, because it was not filed within the period of Pennsylvania's two year Statute of Limitations. It was dismissed despite the fact that during the limitation period Michelle had no competent parent or legal guardian in loco parentis who could have filed the action on her behalf since her mother, Ruby Dyer, was only nineteen (19) at the time of Michelle's birth and was herself a minor under Pennsylvania Law, and her father was not in loco parentis.

The two (2) questions presented by this case are:

1. Does the due process clause of the Federal Constitution permit the Pennsylvania Statute of Limitations to run against a minor who has no competent adult individual in loco parentis to protect his or her interest?

2. Do the Pennsylvania Statutes of Limitations deny equal protection to minors suffering injuries not sustained in an automobile accident, by allowing the statute to run against them during their minority, while tolling the statute during the minority of those minors injured in automobile accidents?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR PLENARY CONSIDERATION	9
APPENDIX:	
Order of Supreme Court of Pennsylvania	A1
Opinion of the Superior Court of Pennsylvania	A2
Opinion of the Superior Court of Pennsylvania in the case of Lisa DeSantis v. Lawrence L Yaw	A10
Notice of Appeal and Proof of Service	A17
Table of States, 4 Am Jur Trials p. 608	A20

TABLE OF AUTHORITIES

Cases:	Page
Carsons vs. Maurer, 424 A.2d 825 (1981)	17
Commonwealth ex rel Teitelbaum vs. Teitelbaum, 160 Pa. Super 286, 50 A.2d 713 (1947)	9
DeSantis Vs. Yaw, _____Pa. Super_____, 434 A.2d 1273 (1981)	1, 7, 10, 11, 12, 16
Hurtado vs. California, 110 U.S. 516, 4 S.Ct. 111 (1884)	13
In re Gault, 387 U.S.1, 87 S.Ct. 1428 (1967)	9
Petri vs. Smith, No. 2798, June Term (1979)	14
Reed vs. Reed, 404 U.S. 71, 92 S.Ct. 251(1971)	16
STATUTES:	
4 Am Jur Trials, p. 608	10
28 U.S.C. §1257(2)	2
28 U.S.C. §2403(b)	2
42 Pa. C.S.A. §5533	2
51 Am Jur 2d 747, §178	9

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania denying Appellants' Petition for Allowance of Appeal, from which this Appeal is taken, is set forth in the Appendix at A1.

The opinion of the Superior Court of Pennsylvania which is unreported, is set forth in Appendix A2. Also attached at Appendix A10 is the Opinion of the Superior Court of Pennsylvania in DeSantis v. Yaw, _____Pa. Super_____, 434 A.2d 1273 (1981), in which majority opinion the Superior Court of Pennsylvania, while upholding the constitutionality of the application of the Statute of Limitations to minors solely on the basis of the Doctrine of Stare Decisis, severely critized the application of the statute to minors and set forth the opinion that such application deserves serious reconsideration because it is inconsistent with constitutional due process and equal protection.

JURISDICTION

The instant case involves a medical malpractice action in which Appellant is seeking review of the decision of the Supreme Court of Pennsylvania of August 10, 1982 denying Appellants' Petition for Allowance of Appeal. The Petition for Allowance of Appeal to the Supreme Court of Pennsylvania raised the question as to the Federal Constitutional validity of the Pennsylvania State Statute -- 42 Pa. C.S.A. §5533 -- which allows the Statute of Limitations to run against a minor. The Pennsylvania Supreme Court's denial of the Petition for Allowance of Appeal had the effect of affirming the constitutional validity of this statutory provision. The Notice of Appeal in this case was filed with the Clerk of the Pennsylvania Supreme Court on October 29, 1982. The jurisdiction of this court is invoked under 28 U.S.C. §1257(2). Title 28 U.S.C. §2403(b) may be applicable.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Pennsylvania Statute which is the subject of this constitutional challenge provides as follows:

> "Except as otherwise provided by statute, infancy, insanity or imprisonment does not extend the time limited by this subchapter for the commencement of a matter." 42 Pa.C.S.A. §5533

The Federal Constitutional provisions that it is submitted are violated by the foregoing Pennsylvania State Statute are as follows:

AMENDMENT XIV OF THE UNITED STATES CONSTITUTION

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On September 5, 1972, Petitioner, Michelle Dyer, was born at Lower Bucks Hospital as a premature baby, weighing only three (3) pounds. At the time of her birth, her mother, Ruby Dyer, was herself a minor only nineteen (19) years of age. Michelle was born of a broken home, her natural father, at the time of her birth, not residing with her mother, but being incarcerated in prison. After birth, Michelle was placed in the Lower Bucks Hospital Nusery for premature children and was subsequently attached to a heart monitor which was apparently standard procedure for premature infants. The monitor worked by the means of an electrode that was attached to the child's chest and which signaled an alarm if the child ceased to breath. On the next day after Michelle's birth at approximately 8 o'clock a.m., a staff pediatrician from Lower Bucks Hospital, one Dr. Albert Flacco, who was entrusted with Michelle's care, noted on a hospital record that the monitor "has to be disconnected because of excess irritation of skin on trunk, from what?, probably lubricant from electrodes" (R44a 140a). At 3:00 p.m., that same day, the Lower Bucks Hospital records indicated that Dr. Flaco again examined Michelle and directed that she be transferred to Thomas Jefferson University Hospital, Intensive Care Unit, because of life threatening respiratory difficulties (R46a 140a).

Prior to Michelle's discharge to Jefferson, her mother, Ruby Dyer, was visited in her hospital room by Michelle's Doctor, presumably Dr. Flacco, and advised that Michelle was having breathing problems and had to be transferred to Jefferson's Intensive Care Unit for premature children At this same time, Mrs. Dyer was also advised by Dr. Flacco that she was

not to be alarmed but that her new born child was apparently allergic to a chemical in a gel that was used with the electrodes, and that as a result Michelle had developed "an irritated rash" on her chest. Mrs. Dyer was specifically told that this rash would shrink and clear up in time. Her testimony to this effect is corroborated by Lower Bucks Hospital's own records and reports signed by Dr. Flacco, which described Michelle's condition as merely "excess irritation" (R140a). Nowhere in the Lower Bucks report was there any mention of burns to Michelle, let alone any second and third burns to her chest area. Dr. Flacco also admitted that he never mentioned anything to Mrs. Dyer at the time of Michelle's birth about Michelle having received any burn injury.

Curiously, however, immediately upon Michelle's admission to Jefferson Hospital that same day for her severe respiratory problems, the admitting physician noticed and diagnosed Michelle's chest as having second and third degree burns (R148a 149a).

At Jefferson Hospital, Michelle was admitted into the Intensive Care Nusery and was treated primarily for her respiratory problems which were diagnosed as Hyaline Membrane Disease. During her stay at Jefferson, Michelle was also treated for several other health related problems including Jaundice and the second and third degree burns of her chest previously mentioned. It was the opinion of the Plastic Surgeon who examined Michelle at Jefferson the day after her admission that the child had "burns on the chest probably produced by hypertonic solution" which is an electrode cleaning solution (R152a). Michelle was finally discharged from Jefferson in the latter part of November, 1972.

After Michelle's discharge from Jefferson, she did not, as in the normal case, go home to reside with her mother. Instead, during the first several years of Michelle's life her mother left her in the care of third persons, and only visited Michelle infrequently. At that time, Michelle's mother, Ruby Dyer, was herself a minor and was obviously not competant to care for the child as is apparent from the fact that she left Michelle in the care of third persons. At that time Mrs. Dyer was unemployed and survived by means of public assistance.

It was Mrs. Dyer's testimony during her deposition that during the first several years of Michelle's life, Mrs. Dyer did not realize that what she had been told and thought was a rash on her child's chest was not shrinking or clearing up as she had been led to believe by personnel at Lower Bucks Hospital, but that, in fact, the chest appeared to be becoming white and scarred (R108a). While the Lower Court either did not accept this testimony or concluded, under an objective standard, that Mrs. Dyer should reasonably have been aware of the burn injury earlier on in Michelle's life, thereby not applying the discovery rule to toll the Statute of Limitations, the facts are not disputed that Michelle was first taken to a physician with respect to the problem regarding the burn injury to her chest in 1977. The physician, Dr. Albert Davne, advised Mrs. Dyer for the first time that her daughter had suffered second and third degree burns of her chest and that this would result in permanent and disfiguring scarring. Secondly, Dr. Davne advised that Michelle's nipples had been destroyed and that she could not be expected to develop a functional breast as a result. In addition, the Doctor expressed the opinion that future breast development may not take place and that the psychological effect of this injury might lead to serious emotional-mental problems commencing with the onset of adolescence.

As a result the instant action was commenced on June 13, 1977 by the filing of a "Notice Complaint" with the office of the Medical Malpractice Administrator for the Commonwealth of Pennsylvania. It was thereafter referred to the Court of Common Pleas of Bucks County, Pennsylvania and a Complaint against the hospital was formerly filed with that Court on August 1, 1977. Defendant answered the Complaint raising the affirmative defense of the Statute of Limitations by way of new matter. Thereafter, subsequent to the deposition of Mrs. Dyer, Defendant filed the instant Motion for Summary Judgment. Plaintiff answered the Motion for Summary Judgment asserting as new matter, inter alia, that the Constitutional provisons of Due Process and Equal Protection require that the Statute of Limitations regarding any possible cause of action for malpractice be tolled during minority in a case such as this.

The Bucks County Court granted the Motion for Summary Judgment, and the grant of this Motion was affirmed by the Pennsylvania Superior Court, although in affirming with respect to the issue of the Constitutionality of the Statute of Limitations as applied to minors, the Superior Court cited the recent case of DeSantis vs. Yaw, _____Pa. Super ____, 434 Atlantic 2d, 1273 (1981), in which case the majority of the Pennsylvania Superior Court Panel concluded that it was time Pennsylvania reconsidered the application of the statute to minors because of serious Due Process and Equal Protection considerations. From the decision of the Pennsylvania Superior Court, Appellant filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, which despite the Pennsylvania Superior Court's conclusion that it was time to reconsider the Constitutional validity of Pennsylvania's Common Law Doctrine,

refused to grant the Petition for Allowance of Appeal, thereby, affirming the Constitutional validity of Title 42 Pa.C.S.A. §5533 which provides for the running of the Statute of Limitations against a minor.

REASONS FOR PLENARY CONSIDERATION

It is respectfully submitted that the Commonwealth of Pennsylvania's continued adherence to those vestiges of the Doctrine of Paterfamilias which permit a parent's inaction to deprive a child of an essential property right, results in a clear deprivation of the constitutional rights of the child, and has no place in modern constitutional thought. The law now recognizes that parents no longer retain the unquestioned right to the services and property of their minor children. On the contrary, even in Pennsylvania it has been recognized that the relationship between parent and child is no longer one involving a property right. See e.g. Commonwealth ex rel Teitelbaum vs. Teitelbaum, 160 Pa. Super 286, 50 A.2d 713 (1947). Fortunately, the rights of children have advanced since the days of the early common law to the point where it has been recognized that children too have constitutional rights. In re Gault, 387 U.S. 1, 87 S.C.t. 1428 (1967).

Consistent with the foregoing advances in constitutional thought, the vast majority of jurisdictions within these United States have recognized that a child's right in an existing cause of action, despite its intangible nature, is a property right with respect to which the child cannot be deprived by the action of inactions of its parents. In particular, most jurisdictions have concluded that a child cannot be depirved of a cause of action through the failure of a parent or guardian to institute suit on his behalf during the period of the child's minority when the child himself is barred from bringing the action in his own name. As is stated in 51 Am Jur 2d 747, §178:

> "In virtually all states today some form of statutory provision is made for the suspending of

> the operation of Statutes of Limitation against causes of action in favor of persons under disability or who do not have capacity to sue."

See also Table of States in which minority suspends the Statute of Limitation found in 4 Am Jur Trials p. 608 and attached hereto at Appendix A20.

A few states, however, have still refused to recognize the independant constitutional rights of children with respect to a cause of action and continue to adhere to the ancient Common Law Doctrine of Paterfamilias by concluding that a parent has the right to deprive his child of a cause of action by failure to commence an action on the child's behalf within a limitation period which runs during minority. The Commonwealth of Pennsylvania, unfortunately, is one of these states. Through the lobbying efforts of the insurance industry, Pennsylvania still retains the view that minority does not toll the Statute of Limitations. This position is one of Statutory Law in Pennsylvania -- 42 Pa. C.S.A. §5533 -- and applies even in cases such as the instant one, where the minor has no competent parent or guardian in loco parentis.

We submit that in this day and age, in light of the advances in constitutional thought, notably in the area of equal protection, fundamental fairness, and children's rights, it is clearly unconscionable for the courts of Pennsylvania to permit the Statute of Limitations to run against a new born child who has no competent adult individual in loco parentis to protect that child's rights. To hold to the contrary, is to clearly and certainly deprive the child of a right in a cause of action for personal injuries, which despite its intangible nature, has been recognized as a form of property in the Commonwealth of Pennsylvania DeSantis vs. Yaw, _____Pa. Super_____, 434 A.2d 1273 (1981).

The majority of the Pennsylvania Superior Court, which has been the last court in Pennsylvania to give any consideration to the

constitutionality of the Pennsylvania Statutory provision allowing the Statute of Limitations to run against minors, has clearly indicated its opinion that such statutory provision not only violates the constitutional provisions of Due Process, but also Equal Protection. DeSantis vs. Yaw, Supra. In that case, although the Superior Court affirmed the constitutionality of the statute in question solely on the basis of stare decisis, the court went into great detail in critizing the constitutional foundation for Pennsylvania's blind adherence to the old Common Law Doctrine.

In the Pennsylvania Superior Court Opinion in DeSantis Supra, the statutory provision subject to this constitutional challenge was analyzed with respect to the fundamental fairness of the application of such a statute to a minor who has no competent adult individual in loco parentis to protect him or her. This, as noted in the Statement of the Case, is the situation in the case at bar. It is self-evident that any minor such as Michelle Dyer, who was a new born at the time of her negligent injury by the Defendant Lower Bucks Hospital, cannot take the necessary steps to adequately protect themselves in the event that they suffer an injury as a result of a party's negligence. First, they are under a legal disability and cannot institute suit in their own name, and obviously of more importance, their tender years prevent them as a practical matter from asserting a claim even if they could. Normally, this is answered by asserting that the child can rely upon his parent or guardian to protect his interest and institute suit on his behalf. This argument, however, has no application in the case at bar.

In this case, the new born in question did not have competent adult parents who could protect her interest. Her natural father separated from the child's mother at the time of or shortly after Michelle

birth and thereafter neither supported nor visited Michelle at all. In essence, Michelle is a child whose father has abandoned her. Michelle's mother, Ruby Dyer, was at the time of Michelle's birth herself a minor under the then applicable Pennsylvania Law, and as such, even if Mrs. Dyer had desired to institute suit on behalf of her daughter, she would have been under legal disability to do so. Furthermore, Mrs. Dyer did not reside with and care for her daughter during the first several years of her life; instead, Michelle was left in the care of third persons, neither her father or mother.

In such a circumstance, the basic reasoning behind the Pennsylvania Superior Court's criticism of the application of Pennsylvania Statute of Limitations to a minor as set forth in DeSantis vs. Yaw, Supra. clearly applies. As the Court stated in that Opinion:

> "Not all children have parents. The minor in Von Colln did not. Appellee's proposition that the limitation is fair "as to minors and parents" cannot be extended to assume that orphanages, foster parents, and juvenile homes have the emotional dedication to fight a prompt legal battle and to maintain the often slow progress through the court system. A foster mother may be honestly dedicated to hot meals and clean linen and emotional support yet quail at the thought of embarking on several years of legal battle for a member of her changeable brood. As to parents themselves, some are lazy or frightened or ignorant or religiously opposed to legal redress. Still, they have their remedy available to them if they choose to use it. A child does not. The situation comes to this: a personal property right belonging to a legally faultless citizen may and often has been forfeited because no legally competent party has volunteered to undertake an action in the child's behalf. By the time the child reaches maturity the property has vanished. For this, it appears, no one is responsible. Can this lack of remedy comport with due process? p. 1276 and 1277

"Can this lack of remedy comport with Due Process?" To ask this question would appear to answer it. Due Process means, in essence, a fundamental fairness. Notions of fairness and what is necessary as a constitutional requirement of fundamental fairness has changed over the years fortunately for all of us. As the Pennsylvania Superior Court recognized, it is not sufficient to answer the questions by, in essence, stating that whatever is, is right. If this was the approach that the courts in this country took, children would still be viewed as property of their parents and Blacks would still be slaves. Fortunately, the capacity of the common law to adopt itself to changing mores and values has long been recognized as one of its greatest strengths. Hurtado vs. California, 110 U.S. 516, 4 S.Ct. 111 (1884). It certainly does not take a great humanitarian to realize that it is simply not fair to deprive a new born child of a cause of actio not because of anything the child did, but because of incapacity or incompetence of the child's parents. This is no more fair than to say to a child that he may be deprived of other opportunities in life because of his race, sex, or religion. To deny this Appeal is, in effect, to say to Michelle Dyer that she is going to be deprived of her right to pursue a cause of action against a clearly negligent hospital and to recov sufficient damages from that hospital in order for her to afford the expensive and time consuming medical costs of plastic and reconstructive surgery necessary for her to lead some semblance of a normal life, merely because she was unfortunate enough not to have competent adult individuals in loco parentis at the time that her injury occurred. Try explaining this to a nine (9) year old child.

While we recognize that the Statute of Limitations promotes a statutory purpose in requiring claimants to bring their actions while

events and evidence are still fresh, and that such a purpose may even generally be constitutional as applied to minors, it would appear that the benefits to be gained by such a purpose do clearly not outweigh the violations of the fundamental right of those few minors who are not fortunate enough to have a competent adult individual who can act on their behalf.

Such a conclusion has not only be recognized by the Superior Court of Pennsylvania, but also by the Court of Common Pleas of Philadelphia in the case of Petri vs. Smith, No. 2798 June Term (1979), in which case the court held that infancy tolls the Statute of Limitations where the parents are not available to investigate the causal relationship between the parties alleged negligence and the injuries sustained by a minor at birth. In such a situation, as the legislatures of the vast majority of states in this country have recognized, and as has been recognized by the courts in the Commonwealth of Pennsylvania who have taken the time to review this situation, the traditional approach of Pennsylvania to the Statute of Limitations as applied to minors no longer fits comfortably into the framework of the law and should be discarded.

Apart from Due Process consideration, it is submitted that the Pennsylvania statute in question violates the Equal Protection Clause of the United States Constitution. There are two (2) basic Pennsylvania Statute of Limitations provisions which are relevent in the context of this Equal Protection argument. First of all, there is the general Pennsylvania Statute of Limitations on personal injury actions which is the subject of the instant challenge, 42 Pa.C.S. §5533, and then there is the Statute of Limitations contained in the Pennsylvania No-Fault

Motor Vehicle Protection Act 40 P.S. §1009.106(c)(5). The former, as noted above, provides for the running of the Statute of Limitations against a minor. The latter, more recently enacted statute in the No-Fault Act, however, expressly provides for the tolling of the Statute of Limitations during ones' minority. The result of these statutes is to distinquish between minors who suffer personal injuries in automobile accidents, and minors who suffer injuries as a result of other types of accidents, such as malpractice as is involved in this case. A minor who suffers injury as a result of an automobile accident is not deprived of his right of action through the lack of initiation of legal proceedings by his parent or guardian; on the other hand, the minor who suffers personal injuries in a malpractice action such as this one is discriminated against and deprived of his right of action unless his parent or guardian over which he has obviously no control, acts on his behalf. The Pennsylvania Superior Court in analyzing this disparity, concluded that it results in a clearly meritorious equal protection argument.

> "By analogy, a provision of our No-Fault Law becomes relevant. Our legislature has afforded to minors injured in motor vehicle accidents an exemption to the bar of the Statute of Limitations. The courts of Massachusetts could see no reason to distinquish loss of parental society because of death, from loss of parental society because of injury; the child was perceived as legally entitled to his relief from harm in either instance. Similarly, distinquishing tort by motor vehicle from other negligent injuries appears invidious. Whether the impairment that the injured adult suffers from is the result of a childhood vehicle injury, a hunting accident, or a fall from a rotting balcony is immaterial to his embarrassment, pain, and loss of future earning power. The legislature has already entitled children to relief from the statutory bar and has found legal entitlement to redress for tort injury under certain circumstances; logic would suggest that

> the entitlement be extended to cover tortious injuries indistinquishable in their effect on the injured person.
>
> If the right is not extended, then an Equal Protection argument becomes apparent. Children injured tortiously during their minority are at present unequally treated: children injured by a motor vehicle may bring suit during their entire minorities by an adult and for another two years in their own name. Children tortiously injured in any other manner have a two-year statutory limit and may enforce their claims only through the voluntary services of an adult, unless they happen to attain majority during the statutory period.
>
> Tortiously injured children would appear to be a reasonable classification; certainly until passage of the No-Fault Law that group suffered equally in its legal treatment. No rational state policy leaps to mind to explain the present difference in treatment." DeSantis vs. Yaw, Supra. p. 1278, 1279

The United States Supreme Court has made it clear that distinctions which bear no fair and reasonable relation to the object of the legislation in question constitute a violation of the Equal Protection Clause of the United States Constitution. Reed vs. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971). With respect to the two (2) foregoing Pennsylvania Statutes of Limitations, it is clear that they discriminate between minors suffering injuries as a result of automobile accidents, and minors otherwise suffering tortious injuries. The question then becomes whether such a difference in treatment has any fair and substantial relation to the legislative purpose behind the enactment of the limitation provisions. The answer to this question, we submit, is that there is clearly no fair and substantial relation behind the purpose of the enactment of the two Statutes of Limitations and the foregoing distinction That distinction is clearly arbitrary and unreasonable. The obvious purpose behind both Statutes of Limitations is to prevent stale claims.

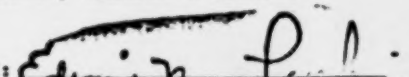
This purpose, however, is not in any way served by discriminating between minors suffering one type of injury as opposed to another. The interest of the state in preventing stale claims from being submitted and the dangers inherent in same would appear to be no less significant in cases where the minor Plaintiff was injured in an automobile accident, than when the minor Plaintiff was injured in another type of accident. Means of proof, recollection of facts regarding the incident surrounding the injury, and other matters of similar nature all present the same situation regardless of how the minor involved was injured. As such, it appears clear that the discrimination against those minors injured in other than automobile accidents is arbitrary and unreasonable and violates their right to equal protection.

The foregoing equal protection problem was recognized not only by the Pennsylvania Superior Court, but also in a very similiar case decided by the Supreme Court of New Hampshire, Carsons vs. Maurer, 424 A.2d 825 (1981). The Carsons case involved a situation clearly analogous to the one presently before this Court, and after thorough consideration the Supreme Court of New Hampshire held the Statute of Limitations provision in question unconstitutional as a violation of equal protection. The Carsons case involved two New Hampshire Statutes of Limitations, one of which, being the general statute, provided that the statute was tolled during minority, and the other of which applied only to malpractice actions and provided that the statute did run against minors who were injured by medical malpractice. In these circumstances, the Supreme Court of New Hampshire held the provision of the malpractice statute of limitations unconstitutional as a violation of equal protection since it permitted the statute to run against the claims of minors, while the generally applicable Statute of Limitations did not. The court

said that there was no reasonable basis for tolling the statute in the case of one injury and not in the case of another. Our situation is, we submit, clearly analogous. In the New Hampshire situation the statute was tolled as to minors in general cases of personal injury, while it was not tolled with respect to minors injured in malpractice cases. In Pennsylvania the statute is tolled as to minors in automobile accident cases but not as to cases involving personal injuries otherwise incurred. The reasoning, however, is exactly the same and there can clearly be no reasonable basis for tolling the statute in the case of one type of injury and not the other. As such, we submit that the instant Appeal presents constitutional questions so substantial as to require plenary consideration, with briefs on the merits and oral argument, for the resolution thereof.

While as noted throughout this statement, most jurisdictions within the United States statutorily provide exemptions for the tolling of the Statute of Limitations during minority, we submit that the necessity for allowing such an exemption in the case of minors who have no competent adult individual in loco parentis clearly rises to constitutional proportions.

BEGLEY, CARLIN & MANDIO

BY: 

EDWIN D. POPKIN

Supreme Court of Pennsylvania

arlene F. Lachman, Esq.
PROTHONOTARY

Eastern District

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(215) 496-4600

August 17, 1982

John P. Koopman, Esq.
S. Richard Klinges, III, Esq.
120 Mill Street
Bristol, Pa. 19007

Re: Michelle Dyer, a Minor v. Lower Bucks County Hospital
No. 233 E.D. Allocatur Docket 1982

Dear Mr. Koopman and Mr. Klinges:

This is to advise you that the following order has been endorsed on the Petition for Allowance of Appeal in the above-captioned matter:

August 10, 1982
Petition denied.
Per Curiam

Very truly yours,

Marlene F. Lachman, Esq.
Prothonotary

MFL:ejh
cc: Allan H. Starr, Esq.
LeRoy S. Zimmermann, Esq.

J. 189/82

MICHELLE DYER, a minor by RUBY DYER, her parent and natural guardian Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
VS.	:	
LOWER BUCKS COUNTY HOSPITAL Appellee	:	No. 2089 Philadelphia 1981

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY ENTERED JULY 16, 1981 IN CASE NO. 77-323-05-2, CIVIL ACTION - LAW

BEFORE: WIEAND, CIRILLO and POPOVICH, JJ.

FILED MAR 19 1982

PER CURIAM:

Order of the lower court is affirmed.

J. 189/82

MICHELLE DYER, a minor by RUBY DYER, her parent and natural guardian Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
VS.	:	
LOWER BUCKS COUNTY HOSPITAL Appellee	:	No. 2089 Philadelphia 1981

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of BUCKS County be, and the same is hereby AFFIRMED.

BY THE COURT:

J. Haniel Henry
PROTHONOTARY

Dated: March 19, 1982

(A3)

J. 189/82

MICHELLE DYER, a minor by RUBY DYER, her parent and natural guardian Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
VS.	:	
LOWER BUCKS COUNTY HOSPITAL Appellee	:	No. 2089 Philadelphia, 1981

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY ENTERED JULY 16, 1981 IN CASE NO. 77-323-05-2, CIVIL ACTION - LAW

BEFORE: WIEAND, CIRILLO and POPOVICH, JJ.

MEMORANDUM OPINION:

This appeal is taken from the grant of summary judgment in favor of appellee, Lower Bucks County Hospital, and against appellant, Michelle Dyer, a minor, by Ruby Dyer, her parent and natural guardian. Appellant alleged medical malpractice by appellee because of burns she suffered as the result of an allergic or chemical reaction to a substance used in connection with an apena monitor placed on minor appellant's chest the day after her birth.

Appellant raises three issues: first, whether the grant of summary judgment in favor of appellee was proper; second, whether the statute of limitations of two years in a medical malpractice action was tolled, either by the "discovery rule", or the committment of fraud by the appellee; third, whether the statute of limitations can constitutionally bar a minor's suit in trespass.

EXHIBIT "A"

> Summary judgment may only be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law'. Pa. R.C.P. 1035(b). On appeal, the record must be examined in the light most favorable to the non-moving party. Keating v. Zemel 281 Pa. Super. 129, 131, 421 A.2d 1181, 1182 (1980)

Because of the applicability of that standard in this case, we set forth the factual history based on the record as a whole.

Appellant, Michelle Dyer, was born prematurely on September 5, 1972 at Lower Bucks County Hospital, the appellee. Appellant was placed on an apena monitor because of cessations in her breathing processes. In light of her poor medical condition, appellant was transferred to Thomas Jefferson University Hospital (hereafter "Jefferson") on September 6, 1972, the day after her birth. Appellant's mother, Ruby Dyer, was told by a physician at appellee hospital, within twenty-four hours of appellant's birth, and within a few minutes of the appellant's transfer to Jefferson, that the minor appellant had suffered an allergic or chemical reaction to an electrode gel used in connection with the apena monitor. Appellant's mother observed the condition of minor appellant's chest after the minor's discharge from Jefferson on November 23, 1972. Appellant's chest had a rash with raised, white pimples over the entire breastbone area. On December 12, 1972, appellant was readmitted to Jefferson. Appellant's mother explained to

a physician at Jefferson what she had learned about the rash or scars from the physician at Lower Bucks County Hospital. She was told at Jefferson that the appellant had suffered burns on her chest. Additionally, during appellant's stay at Jefferson, appellant's mother observed a "pigskin" covering which was placed on appellant's chest because of these burns.

The lower court granted appellee's motion for summary judgment, because it found that the statute of limitations barred suit, based on the date of the complaint, that is, suit was not instituted until seven years after the alleged injury occurred. We agree with the lower court.

The applicable statute of limitations provides:

> that actions and proceedings must be commenced within two years:
>
> . . .(2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another. 42 Pa.C.S.A. §5524(2).[1]

Appellant's mother was informed of the injury on September 6, 1972, but she did not file suit until August 1, 1977.

Appellant had raised the "discovery rule", that is, if appellant's mother did not discover the scars from the burns until the appellant was approximately three years old, then the two-year statute of limitations was not tolled until late 1975. The record does not support appellant's contention. The

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[1]Prior law: 12 P.S. §34. Additionally, the parties do not contest that the applicable statute of limitations is two years.

"discovery rule" has been held to mean that:

> the statute of limitations commences to run from the time plaintiff discovered or should have discovered the cause of harm or injury. Acker v. Palena 260 Pa. Super. 214, 219, 220, 393 A.2d 1230, 1232 (1978); citing, Ayers v. Morgan 397 Pa. 282, 289-90, 154 A.2d 788, 792 (1959).

The Supreme Court in Ayers, supra, at 290, held that:

> the injury is done when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable.

Construing the record, in the light most favorable to the appellant, the non-moving party, we believe that the filing of the complaint in trespass on August 1, 1977 was too late. Ruby Dyer, appellant's mother, had sufficient knowledge of the condition of her daughter's chest to initiate suit within the statutory period. The statute of limitations was not tolled, here, as in other cases, because of an unobservable or "inherently unknowable" injury. "Mere mistake, misunderstanding, or lack of knowledge do not toll the running of the statute of limitations." Walters v. Ditzler 424 Pa. 445, 449, 227 A.2d 833 (1967).

Appellant also contends that Lower Bucks County Hospital was fraudulent. The standard of fraud put forth in medical malpractice cases indicates that:

> . . . (b) through fraud, deception or concealment of facts, . . . a defendant lulls an injured person or his representative into a sense of security so that such person's vigilance is relaxed, then the defendant is estopped from evoking the statute . . .; (c) the fraud which will toll the statute and effect an estoppel need not be fraud in the strictest sense, i.e., inclusive of an intent to deceive, but may be fraud in the broad sense i.e. inclusive of an unintentional deception. (citations

omitted) Walters, supra, 449.

In this case, the injury was known to appellant's mother, Ruby Dyer, and there is no evidence that the physician at Lower Bucks County Hospital either intentionally deceived Ruby Dyer, or neglected to tell her of the appellant's injury and how it came about. Additionally, there is no allegation of fraud in the complaint, nor is there an allegation that the statute of limitations should not commence running as of September 6, 1972, the date of the injury, because of the alleged fraud.

Appellant has raised the issue of whether the statute of limitations, as applied to a minor, is constitutional. While it is true that "issues not raised in the lower court are waived and cannot be raised for the first time on appeal" (Pa. Rules of Appellate Procedure 302(a)), appellant raised the constitutional question in new matter contained in appellant's answer to appellee's motion for summary judgment, and, also, in her brief and reply brief.[2]

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[2]The footnote to Pa. Rules of Appellate Procedure states that Rule 2117(c) (statement of place of raising or preservation of issues) and Rule 2119(e) (statement of place or preservation of issues) require that the brief expressly set forth in both the statement of the case and in the argument reference to the place in the record where the issue presented for decision on appeal has been raised or preserved below.

Even though the issue was raised, we find no merit in it because of the recent case of DeSantis v. Yaw, ___Pa. Super. ____, 434 A.2d 1273 (1981). There, this Court outlined the traditional and historical approach in this Commonwealth which has favored the application of the statute of limitations to minors. The minor appellant in DeSantis brought a suit in trespass for injuries she suffered in an automobile accident. The DeSantis court affirmed the holding that the statute of limitations which barred the minor's suit was constitutional. We agree with the DeSantis court, and hold that the two year statute of limitations can constitutionally be applied against a minor in a medical malpractice case.

Order of the lower court is affirmed.

conclusion, the law is overridden or misapplied... discretion is abused." *Adelman v. John McShain, Inc.*, 148 Pa.Super. 188, 24 A.2d 703 (1942).

By reason of the foregoing, the order of the lower court is reversed.

SPAETH and HOFFMAN, JJ., concur in the result.

Lisa DeSANTIS, A Minor by her Parents and Natural Guardians, Raymond DeSantis and Lois DeSantis, Appellants,

v.

Lawrence L. YAW.

Superior Court of Pennsylvania.

Argued April 22, 1981.

Filed Sept. 11, 1981.

Minor brought suit in trespass against plaintiff for injuries suffered by her in an automobile accident. The Court of Common Pleas, Montgomery County, Civil Division, No. 79-22403, Salus, J., found for defendant on the pleadings, and the minor appealed. The Superior Court, No. 2272 Philadelphia, 1980, Montemuro, J., held that the statute of limitations barring the minor's suit, even though she did not attain majority during the statutory period, was constitutional.

Affirmed.

Watkins, J., concurred and filed opinion.

Limitation of Actions ⇐4(2)

Statute of limitations barring minor's suit in trespass, even though she did not attain majority during the statutory period, was constitutional. 42 Pa.C.S.A. §§ 5524, 5533.

Richard K. Hohn, Philadelphia, for appellants.

D. Barry Pritchard, Jr., Lansdale, for appellee.

Before WICKERSHAM, MONTEMURO and WATKINS, JJ.

MONTEMURO, Judge:

On January 7, 1980, plaintiff, Lisa DeSantis, a minor, brought suit in trespass against defendant, Lawrence L. Yaw, for injuries suffered by her in an automobile accident which occurred September 10, 1977. The defendant alleged as New Matter that the claim was barred by the statute of limitations.

The issue was argued, and the Court found for the defendant on the pleadings. The plaintiff filed a Concise Statement of Matters Complained Of On Appeal, and set forth as her sole ground for reversal of the decision barring her action that the statute of limitations should be unconstitutional as applied to minors.

The lower court's opinion held that statutes of limitation are favoured in law, and that plaintiff's constitutional arguments, while interesting, were without merit. This court, however, has examined the issue from an historic approach as well as from a constitutional perspective and has become convinced that the traditional approach of our courts to the statute of limitations as applied to minors no longer fits comfortably into the framework of the law. Review of the matter is timely.

Historically, western civilization has considered the minor child as the belonging of its father. The *paterfamilias* of Roman times had absolute power of his household, and could sell his children into slavery or kill them at will.[1]

1. Hon. Harry M. Fisher, "Pater Familias—A Cooperative Enterprise," 41 III.L.R. 27, 28 (1946) and authorities cited therein.

Under the English common law doctrine of *paterfamilias* a father still retained an "unquestioned right" to the services and custody of minor children, and it appears that this right did not depend upon fulfillment of corresponding duties, at least not upon any legally enforceable ones.[2] Blackstone regarded the duty of support as a "natural" duty but absent statute not a *legal* one, and courts of the United States have also pronounced the duty merely "moral," 42 Harvard Law Review, *supra* note 2, at 112.

The familiar doctrine of reciprocity of duties of support and rights to custody and services appears to have been the creation of common law judges interested in "spinning out a symmetrical pattern of rights and duties," *Id.* Even in relatively modern times the right to recover for a child's injury remained in the father alone and did not extend to a mother, even if widowed and providing nursing for a minor who had brought income to the household prior to an injury. *Fairmont and Arch Street Passenger Railway Co. v. Stutler*, 54 Pa. 375 (1867).

Interestingly, the *Fairmont* court also distinguished between intentional torts and negligent ones, and concluded that even a father would have been able to recover only for seduction of a daughter or battery of a son, which represented willful trespasses upon his own rights in his children. For negligent injury, recovery would lie in the child himself.

Then as now, an infant was required to bring his action through an adult as guardian or next friend. 13 *Standard Pa. Practice*, 325–326, 335. Presumably, therefore, the only recovery conceived of as possible in *Fairmont*, would be to the child for pain and suffering and for loss of earnings after reaching his majority, and these would have to be sued for by the parent as next friend.

That position appears to have been an anomaly even for the era in which the holding was published, for the identical court only three years before had reached a different result altogether in *Oakland Railway Co. v. Fielding*, 48 Pa. 320 (1864).[3] The father in *Oakland* retained the recovery awarded him by the lower court for negligent injuries sustained by his son, and the appellate court approved damages limited to "compensation for loss of services, for nursing, and for surgical and medical attendance." *Id.* at 327.

Within thirty years, however, the rights to recovery for both parent and child were clarified and codified in the Act of 1897. Act of May 12, 1897, P.L. 62 sec. 1, 12 P.S. § 1625; 13 *Standard Pa. Practice*, ch. 64 sec. 4, 328–329; 7 *Goodrich-Amram*, Rule 2229(b), "Joinder of Parent and Child" at 418. The actions of parent and child were recognized and ordered to be brought in the same case under penalty of barring the claim of the unjoined party, *Id.* Apparently no trace remained of the notion that the parents' recovery depended upon the intentional nature of the tort as a deliberate invasion of parental rights.[4] Most modern authorities, however, do still view the parents' losses as "more property treated as an action for damages to property rights," than as a personal injury action. 59 Am. Jur.2d at 213; *accord*, 67A C.J.S. at 520–521.

The pattern codified in 1897 has continued to the present date. The child's cause of action and the parents' cause of action are independent of each other, yet both are left to the discretion of the parent and both are barred after the passage of two years

2. Note: Harvard Law Review, Vol. 42 at 112, "Reciprocity of Rights and Duties Between Parent and Child," (1928), also Fisher, *supra* at 31–35.

3. *Fairmont* was argued in Philadelphia and *Oakland* in Allegheny county. Oddly, Woodward, C. J., participated in the decision in both cases, which makes the variance in decision especially hard to fathom.

4. The holding that recovery for the father depended upon the intentional nature of the tort and also upon an analogy to the master-servant relationship was not a quirk of the *Fairmont* court, however. The same arguments are presented in 3 Blackstone 140–142, and may be traced in case law, see e. g. *Logan v. Murray*, 6 Serg.R.Pa. 175.

from the date of the accident. The operation of 42 Pa.C.S.A. 5534 [the two-year statute of limitations for negligent tort recovery] in conjunction with 42 Pa.C.S.A. 5533 [disabilities do not extend a statute of limitations unless the statute itself so provides] accomplishes this result.

There is no doubt at all that the present law of this Commonwealth is expressed by the lower court's opinion in the instant action. An example of facts congruent with the argument of the instant appellant's counsel can be found in the case of *Von Colln v. Pennsylvania Railroad Co.*, 367 Pa. 232, 80 A.2d 53 (1951).[5] There, the appellant was a minor who had been injured while a resident of a Children's Home. At a time well beyond the statutory limit, but while she was still a minor, appellant brought her action by her husband and guardian, an adult.

The Supreme Court of Pennsylvania affirmed, without soul-searching, the lower court's decision that minors were bound by the provisions of the statute of limitations equally with adults.

"The settled rule is that infants as well as all others are bound by the provisions of such statutes." *Id.* at 234, 80 A.2d 53.

This court is therefore bound, as was the lower court, to follow the "settled rule" in the matter; and we affirm the Order of September 4, 1980, granting defendant judgment on the pleadings based on a statute of limitations defense.

The decision is not a comfortable one, however, and it is our opinion that this question deserves serious reconsideration by the courts at this time. Recent advances in the laws regarding children's rights have made an automatic decision growing out of a tradition that viewed children as possessions completely unpalatable.

Our citizens are guaranteed the right to acquire, possess, and protect property, Constitution of Pennsylvania, Article 1, Section 1. A right to sue on "a chose in action," despite its intangible nature, is ordinarily regarded as a form of property. 63 Am. Jur.2d, "Property," § 26, p. 312; 80 *P.L.E.* "Property" § 43, p. 38. With perfect logic, the common law assumed that a father who "owned" his child's chose in action had the prerogative of allowing that right to lapse. With the advances that recognized the child's right to recover, that assumption became harder to sustain.

The capacity of the common law to adopt itself to changing mores has long been recognized as one of its greatest strengths. See e. g. *Miller v. Monsen*, 228 Minn. 400, 37 N.W.2d 543 (1949); *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884). In the field of children's rights it has made concrete gains by a complicated re-balancing of legal concepts: the relationship of parent and child has become a "status, not a property right," see e. g. *Commonwealth ex rel. Berg v. Catholic Bureau*, 167 Pa.Super. 514, 76 A.2d 427 (1950); *Commonwealth ex rel. Teitelbaum v. Teitelbaum*, 160 Pa.Super. 286, 50 A.2d 713 (1947), and yet at the same time the property rights of children in their parents, corresponding to that of parents in children, have increasingly been recognized.[6] A harder look at the outcome in juvenile criminal matters has led to re-assessment of constitutional rights in children, also on a decisional basis, see discussion *infra*.

Statutory law has tended to keep pace with the common law. Some states have already provided protection for minors against the running of the statute of limita-

5. The facts of the action presently at bar are less sympathetic to the argument counsel presents. There appears to be no reason why Lisa DeSantis' parents could not have brought this action a few months earlier and avoided the statute of limitations problem altogether.

6. By 1924 the Oklahoma court in dictum recognized a tort of malicious interference with a child's right to parental support. *Sharum v. Sharum*, 101 Okl. 273, 225 P. 882, and in the 1940's three jurisdictions recognized a right of action in children for enticement away of a parent. *See 12 A.L.R.2d 1178.* The very recent Massachusetts case of *Ferriter v. Daniel O'Connell's Sons*, see *infra*, has extended the right to recovery for loss of parental companionship and society to actions based on negligent tort injury of the parent.

tions.[7] Our own jurisdiction has provided partial protection by extending recognition of legal disability tolling the statute to a potentially huge class of injured minors—those harmed in vehicle accidents,[8] *Salvado v. Prudential Property and Insurance Co.*, —— Pa.Super. ——, 430 A.2d 297 (1981). The court in *Salvado* squarely considered the awkwardness of permitting the causes of minors to continue to maturity:

> We cannot disregard the clear meaning of [the No-Fault section tolling the statute of limitations] merely because, as appellee contends, a literal interpretation will adversely affect the ability of no-fault carriers to settle claims of minors. *Id.* 430 A.2d at 299.

Appellee in the instant action naturally has stressed the salutary effects of the statutes of limitation. Its brief states that the object is "not to clean up dockets, but to force claimants to bring their actions while the events and evidence are still fresh." (R. Brief of Appellee, p. 2). It then quotes the Supreme Court's 1922 decision in *United States v. Oregon Lumber Co.*, 260 U.S. 290, 43 S.Ct. 100, 67 L.Ed. 261, to the effect that statutes of limitations "promote repose," "give stability to human affairs," and "stimulate to activity and punish negligence." (*Id.* at 299-300, 43 S.Ct. at 103). The brief then quotes a Federal Court decision, *Pittman v. United States*, 210 F.Supp. 703 (N.D.Cal.1962), aff'd 341 F.2d 739 (9th Cir. 1965), cert. den. 382 U.S. 941, 86 S.Ct. 394, 15 L.Ed.2d 351 (1962), which reiterates the viewpoint of our own Supreme Court in *Von Colln*, *supra*, that the "general rule" provides no special protection to infants, absent a statutory provision.

This once again begs the real question by, in essence, stating that whatever *is*, is right.[9] It also places tremendous importance on a public policy favouring repose of actions and punishment for delay, while paying almost no attention at all to what certainly appears to be violation of a fundamental right: a chose in action is a form of personal property that without question now belongs to the injured child himself, and yet he is legally debarred from pursuing his claim.[10]

The minor's tender age has long been recognized as a legal disability, merely a lack of capacity, and not a punishable lack of moral fiber. A statute designed to "force" a claimant incapable of acting to act is certainly suspect. It is no answer to claim, as appellees do, that equal application of the statute "to minors and parents alike discriminates against no class or group and denies no one, either in law or in fact, the right to bring suit. .... a limitation statute does not prevent any minor, simply because she is a minor, from bringing suit." (R. Brief of Appellee at 4)

Plainly, under the law of this Commonwealth minors have never been permitted to initiate their own suits, even if they were old enough and wise enough to do so. Contrary to the statement in appellee's brief, the law does in fact prevent minors, simply because of their status as minors, from bringing suit.

Not all children have parents. The minor in *Von Colln* did not. Appellee's proposition that the limitation is fair "as to minors and parents" cannot be extended to assume that orphanages, foster parents, and juve-

7. See e. g. New Jersey Statutes 2A:14-21.

8. In fact, the plaintiff in the instant action appears to belong to this class of injured minor. Although counsel mentioned some provisions of 40 P.S. § 1009.101 *et seq.* in the complaint, he has never advanced argument under § 106(c)(3) of the No-Fault Act, which is concerned with the statute of limitations and legal disability.

9. That the common law has a remarkable capacity for change cannot be doubted. See argument at text *infra* between Notes 11-12.

10. The Massachusetts Supreme Court has expressed itself on the issue of public policy versus rights of children as follows:

> Children enjoy the same right to protection and to legal redress for wrongs done them as others enjoy. Only the strongest reasons, grounded in public policy, can justify limitation or abolition of those rights. *Sorensen v. Sorensen*, 369 Mass. 250, 339, 339 N.E.2d 907, 912 (1975), *accord*, *Ferriter*, *infra*.

nile homes have the emotional dedication to fight a prompt legal battle and to maintain the often slow progress through the court system. A foster mother may be honestly dedicated to hot meals and clean linen and emotional support yet quail at the thought of embarking on several years of legal battle for a member of her changeable brood. As to parents themselves, some are lazy or frightened or ignorant or religiously opposed to legal redress. Still, they have *their* remedy available to them if they choose to use it. A child does not. The situation comes to this: a personal property right belonging to a legally faultless citizen may and often has been forfeited because no legally competent party has volunteered to undertake an action in the child's behalf. By the time the child reaches maturity the property has vanished. For this, it appears, no one is responsible. Can this lack of remedy comport with due process?

Although *Terry Appeal* and *McKeiver Appeal*, 438 Pa. 339, 265 A.2d 350 (1970) treat the very different problems posed by children in the criminal system, telling analogies to the instant problem can be discerned. The court in *Terry* remarked that the Supreme Court case of *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) was the first case in over sixty-five years which seriously considered the constitutional problems posed by the juvenile court system, and it pointed out that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *Id.* at 343, 265 A.2d 350.

"The proper inquiry" of the court then became the decision as to whether a jury trial was as indispensable as a Constitutional safeguard for children as it had been determined to be for adults, *Id.* at 348, 265 A.2d 350. In balancing the *pros* and *cons* of the right to jury trial, it is significant that every benefit weighed by the court *went directly to a public policy to give the child extra protection*;[11] not one public policy rule based on the needs of the state, the court system, or the victim is enumerated.

The right to a jury is instead balanced off against the traditional benefits the juvenile system at its best offers the child. These benefits make a formidable list: an experienced Bench; access to an unusual amount of rehabilitative expert help; individualized treatment; privacy; a lack of adversary attitudes permitting flexibility of decision.

In short, *Terry* assumes that children may be treated differently from adults but that any deprivation of due process as permitted to children should be tested for its "fundamental" nature against gains to the child himself in the trade-off. By this test, of course, the statute of limitations as applied to children has no redeeming constitutional features. There is no way in which a minor child can be said to benefit by loss of his action after two years.

However, as discussed above, the statute of limitations problem is a civil matter, not a criminal one, and deprivation of the child's right to property in the interest of a policy of bringing only fresh tort claims into court must necessarily be weighed on a different scale. It should, however, be weighed, and not simply subsumed under a "settled rule" of law.

Approaching the matter, therefore, from a civil viewpoint, we find that courts in the past have not hesitated to create new causes of action or abolish longstanding immunities when they have felt the need to conform the law to a changing society. Even a brief sampling of key cases from United States jurisdictions during this century makes the reader reflective: *See e. g. International News Service v. Assoc. Press*, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918) [recognizing a news-gatherer's interest in the news]; *Hitaffer v. Argonne Co.*, 87 U.S.App.D.C. 57, 183 F.2d 811, (1950), overruled on other grounds, *Smither & Co. v. Coles*, 100 U.S.App.D.C. 68, 242 F.2d 220, cert. den. 354 U.S. 914, 77 S.Ct. 1299, 1 L.Ed.2d 1129 (1957) [wife permitted loss of consortium]; *Hargrove v. Town of Cocoa*

11. For the similar viewpoint of the Massachusetts court in civil matters, see preceding Note No. 10.

Beach, 96 So.2d 130 (Fla.1957) [abrogating the doctrine of sovereign immunity]; *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969) [abolishing intrafamily tort immunity for negligence]; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) [allowing damages for violation of fourth amendment rights]; *Ferriter v. Daniel O'Connell's Sons, Inc.*, — Mass. —, 413 N.E.2d 690 (1980) [children's right to recover for loss of parental companionship and society].

Ferriter, *supra*, is of particular interest as it too concerns children's rights. In *Ferriter*, the court re-examined an earlier argument put forth in the 1950 case of *Nelson v. Richwagen*, 326 Mass. 485, 95 N.E.2d 545. The *Nelson* court sustained a demurrer to a minor child's action for enticement of her mother to desertion, largely on grounds that the child had no legal entitlement to her parent's society.[12] The *Ferriter* court, however, discovered that the situation had changed:

> That proposition is no longer true. In an action for wrongful death, the children of the deceased are "persons entitled to receive the damages recovered . . . for "loss of the reasonably expected . . . society . . . of the decedent."

The court then decided that when a child suffers from loss of parental nurture through negligent injury rather than death, no sensible distinction could be made, and the *Ferriter* children were held to have a viable claim. By analogy, a provision of our own No-Fault law becomes relevant. Our legislature has afforded to minors injured in motor vehicle accidents an exception to the bar of the statute of limitations.[13] The courts of Massachusetts could see no reason to distinguish loss of parental society because of *death*, from loss of parental society because of *injury*; the child was perceived as legally entitled to his relief from harm in *either* instance. Similarly, distinguishing tort by motor vehicle from other negligent injuries appears invidious. Whether the impairment that the injured adult suffers from is the result of a childhood vehicle injury, a hunting accident, or a fall from a rotting balcony is immaterial to his embarrassment, pain, and loss of future earning power. The legislature has already entitled children to relief from the statutory bar and has found legal entitlement to redress for tort injury under certain circumstances; logic would suggest that the entitlement be extended to cover tortious injuries indistinguishable in their effect on the injured person.[14]

If the right is not extended, then an Equal Protection argument becomes apparent. Children injured tortiously during their minority are at present unequally treated: children injured by motor vehicle may bring suit during their entire minorities by an adult and for another two years in their own name. Children tortiously injured in any other manner have a two-year statutory limit and may enforce their claims only through the voluntary services of an adult, unless they happen to attain majority during the statutory period.

12. Again, this is a logical extension of the common law view. 3 W. *Blackstone Commentaries* at 143-144 (1768) states as follows:

> We may observe that, in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself or at least the advantages accruing therefrom, while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior as the superior is held to have in those of the inferior; and therefore, the inferior can suffer no loss or injury. Lewis' edition, p. 1139. (Notes omitted)

13. In fact, the recently decided case of *Etrwenia Salvado et al v. Prudential Property and Casualty Insurance*, — Pa.Super —, 430 A.2d 297, 1981, determined that the two-year statute of limitations was tolled in the case of minors and that the two-year limit for further benefits after final payment of a first award was also tolled.

14. *Hitaffer*, *supra*, 183 F.2d at 816-817 makes a similar argument re the "legally protected" interest in consortium; prior to that holding a wife could recover only for intentional invasions and not for negligent ones, but the *Hitaffer* court found the distinction "neither legal nor logical."

Tortiously injured children would appear to be a reasonable classification; certainly until passage of the No-Fault Law that group suffered equally in its legal treatment. No rational state policy leaps to mind to explain the present difference in treatment.

If the state is willing to condone long-outstanding cases for thousands of vehicle-injured children every year, from the infant enroute home from the hospital as well as the adolescent with a learner's permit, why should it find preserving a cause of action for other negligent injuries more intolerable? Proof is never easy after the passage of many years, but no more so in one tort injury than in another. That an issue may be difficult of proof should not prevent a plaintiff from presenting proof if he can do so.

None of the arguments presented in this opinion is designed to advocate a view of equal protection for children that leads to what Professor Lawrence Tribe of Harvard Law School calls a "child-blind" society. We agree with the professor that to tie the movement for justice for children too firmly to a sense of "the historically-rooted oppression of a group properly classified as such" may at times run counter to the real needs of the group by "ignoring its distinctiveness." As Tribe himself expresses it:

> ... in some settings, classification as a substitute for thought may *itself* work grave injustice—as when a person's status as infant, child or adolescent is invoked as a sufficient justification for allowing others to speak, while the person most intimately affected remains unheard and often essentially unseen. Tribe, *American Constitutional Law* (1978) pp. 1077–1078.

In the civil cases of *Ferriter* and *Hitaffer* discussed *supra*, courts found that in logic and in law the child and the wife had legally protected interests in consortium despite ancient law declaring the contrary. In contrast, the criminal case of *Terry* held that the right to jury trial, although indispensable to adult justice, was not constitutionally mandated in juvenile cases. Positive protections available to the child justified the departure from adult procedure.

A flexible approach to matters affecting minors is important. We do not intend to substitute "classification as a substitute for thought." It does appear, however, that the person's status as infant is invoked under present law as sufficient justification for allowing other persons to act or not act in his behalf.

Argument for the State purposes as outlined has several serious flaws: a conspicuous lack of any balancing of benefits to the child, or any statement of inconvenience to the state beyond what is endured in vehicle cases, or any concept of equal protection to all tortiously injured children. It is time to rethink the law in this area and seriously consider change.

The order of the lower court is affirmed.

WATKINS, J., files concurring opinion.

WATKINS, Judge, concurring:

I concur in the result reached by the Majority.

The Act setting forth the time periods in which a civil action may be maintained is not unconstitutional merely because it fails to make a special exception for minors. *Von Colln v. Pa.R.R. Co.*, 367 Pa. 222, 80 A.2d 93 (1951). Furthermore any possible harm which may be suffered by a minor whose parents or guardians fail to initiate any action against a potential tortious wrongdoer within the appropriate time period may be outweighed by the chaos, uncertainty, and severe prejudice which will occur to those accused of tortious conduct, their insurance carriers, and ultimately to the insurance carriers' ratepayers when lawsuits are permitted to be initiated decades after the occurrence of the incident giving rise thereto. Before such a sweeping change is made the question of "reserve requirements" imposed on insurance carriers and the resulting effect on insurance rates as well as many other issues must be addressed. The Legislature, and not the courts, is the proper forum for the resolution of such issues.

IN THE SUPREME COURT OF PENNSYLVANIA

MICHELLE DYER, a minor by RUBY DYER, her parent and natural guardian, : NO. 233 E.D. ALLOCATUR

DOCKET 1982

Petitioners

v. : ATTORNEY I.D. #02022

LOWER BUCKS HOSPITAL,

Respondent :

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that pursuant to 28 USCA §1257(2), Michelle Dyer, a minor by Ruby Dyer, her parent and natural guardian, Petitioners above named, hereby appeal to the United States Supreme Court from the Order of the Pennsylvania Supreme Court entered on August 10, 1982 denying Petitioners' Petition for Allowance of Appeal to the Pennsylvania Supreme Court.

BY: Edwin N. Popkin
EDWIN N. POPKIN

RECEIVED
OCT 29 1982
SUPREME COURT
EASTERN DISTRICT

BEGLEY, CARLIN & MANDIO
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ATTORNEY FOR PETITIONERS

FILED
SUPERIOR COURT
11-1-82

IN THE SUPREME COURT OF PENNSYLVANIA

MICHELLE DYER, a minor by RUBY DYER, her parent and natural guardian,	:	NO. 233 E.D. ALLOCATUR
		DOCKET 1982
Petitioners		
v.	:	ATTORNEY I.D. #02022
LOWER BUCKS HOSPITAL,		
Respondent	:	

PROOF OF SERVICE

I, EDWIN N. POPKIN, hereby certify that on the 29th day of October 1982, a true and correct copy of the foregoing Notice of Appeal was served upon the following persons and courts by depositing said document in the United States mail, with first class postage prepaid, addressed to the addresses below, and that said parties listed below constitute all of the parties required to be served in accordance with the Rules of Procedure of the United States Supreme Court.

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BEGLEY, CARLIN & MANDIO

BY: Edwin N. Popkin

EDWIN N. POPKIN
Attorney for Petitioners

Figure 7. Disabilities Suspending Statutes of Limitation.

NOTES—

Alaska: under 19, insane, imprisoned for less than life. Stat § 09.10.140

Arkansas: minority, insanity, imprisoned out-of-state

Hawaii: under 20, insane, imprisoned for less than life. Rev Laws § 241-12

Illinois: males under 21, females 18; insane or mentally ill; imprisoned

Maryland: minority & non compos mentis (but only if assault and battery or wounding)

Office - Supreme Court, U.S.
FILED
DEC 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-5714

IN THE

Supreme Court of the United States

October Term, 1982

MICHELLE DYER, a Minor by RUBY DYER
Her Parent and Natural Guardian,
Appellants

v.

LOWER BUCKS COUNTY HOSPITAL,
Appellee

On Appeal From the Supreme Court of Pennsylvania,
No. 233 E. D. Allocatur Docket 1982

APPELLEE'S MOTION TO DISMISS

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QUESTIONS PRESENTED

This appeal relates to the Pennsylvania Statute of Limitations for personal injury actions. The statute reads as follows:

> "The following actions and proceedings must be commenced within two years: . . . (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another." 42 PA. C. S. A. § 5524(2)

There is no exception tolling the statute of limitations during infancy:

> "Except as otherwise provided by statute, infancy, insanity or imprisonment does not extend the time limited by this sub-chapter for the commencement of a matter." 42 Pa. C. S. A. § 5533.

This Court is asked by appellant to find that 42 Pa. C. S. A. § 5533 is in violation of the Fourteenth Amendment to the United States Constitution.

Appellant has asserted her right to bring this appeal under 28 U. S. C. § 1257(2). Appellee respectfully submits that this Court does not have jurisdiction under that section and the appeal must be dismissed.

The questions presented are:

1. Whether Appellant has properly raised a federal question?
2. Whether the issue raised by appellant was expressly decided by the Pennsylvania Supreme Court?
3. Whether there is a substantial federal question presented?

PARTIES TO THE PROCEEDING

Appellant—Michelle Dyer, a minor, by Ruby Dyer, her parent and natural guardian.

Appellee—Lower Bucks County Hospital.

Pursuant to Pa. R. C. P. 235, and U. S. Supreme Court Rule 28, the Attorney General of the Commonwealth of Pennsylvania has been given notice of this appeal.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
STATUTES AND PROCEDURAL RULES INVOLVED	1
MOTION TO DISMISS	1
STATEMENT OF THE CASE	2
ARGUMENT	7
I. Appellant Has Not Properly Raised a Federal Question	7
II. The Issue Raised by Appellant Was Not Expressly Decided by the Pennsylvania Supreme Court	8
III. The Federal Question Presented Is Not Substantial	9
CONCLUSION	20
APPENDIX:	
Order of Supreme Court of Pennsylvania Dated August 10, 1982	A1
Order and Opinion of the Superior Court of Pennsylvania Dated March 19, 1982	A2
Court of Common Pleas of Bucks County Opinion and Order in Michelle Dyer, etc. v. Lower Bucks County Hospital, No. 77-7323-05-2 of December 2, 1980	A9
Court of Common Pleas of Bucks County Opinion and Order in Michelle Dyer, etc. v. Lower Bucks County Hospital, No. 77-7323-05-2 of July 16, 1981	A15
Superior Court of Pennsylvania Order of November 30, 1981 in Michelle Dyer, etc. v. Lower Bucks County Hospital, No. 2089, Philadelphia, 1981	A18
Judgment of the Superior Court of Pennsylvania, March 19, 1982, No. 2089, Philadelphia, 1981	A20

TABLE OF CONTENTS (Continued)

	Page
Notice of Appeal	A21
Pertinent Portion of Deposition of Ruby Dyer; Specifically Page 48, Line 13, to Page 49, Line 12	A22
United States Supreme Ct. Rule 16.1(b)	A23
28 U.S.C. 1257(2)	A24
28 U.S.C. 2401(b)	A25
40 P.S. 1009.103	A26
40 P.S. 1009.106(c)	A26
Notice to the Bar, 271 Pa. Super. 587 (1979)	A28
Grant of Extension	A29
Proof of Service	A30

TABLE OF AUTHORITIES

Cases: Page

Astemborski v. Susmarski, 22 W. D. Appeal DKT (Pa. Supreme Court) Slip Opinion, November 4, 1982 14

Atchafalaya Land Company v. F. B. Williams Cypress Company, 258 U. S. 190 (1922) 11

Carson v. Maurer, 424 A. 2d 825 (N. H. 1980) 8

Chase Security Corporation v. Donaldson, 325 U. S. 304 (1945) 13

DeSantis v. Yaw, 290 Pa. Super. 535, 434 A. 2d 1273 (1981) 14, 15, 16, 19

Gallick v. Baltimore and Ohio Railroad Company, 372 U. S. 108 (1963) 8

Honeyman v. Hanan, 300 U. S. 14 (1937) 7

K. N. v. Cades, 288 Pa. Super. 555, 432 A. 2d 1010 (1981) .. 9

Mann v. United States, 399 F. 2d 672 (9th Cir. 1968) 13

Mattson v. Department of Labor and Industries of Washington, 293 U. S. 151 (1934) 11

Mills v. Habluetzel, 102 S. Ct. 1549 (1982) 13, 14, 18

Murray v. City of Milford, Connecticut, 380 F. 2d 468 (2d Cir. 1967) 12

Peterson v. Delaware River Ferry Company of New Jersey, 190 Pa. 364 (1899) 16

Petri v. Smith, No. 1968 Phila. 1981, Slip Opinion, October 22, 1982 .....15, 16

Pittman v. United States, 210 F. Supp. 763 (N. D. Calif. 1962), aff'd 341 F. 2d 739, *cert. denied*, 382 U. S. 941 (1965) 12

Railroad Telegraphers v. Railway Express Agency, 321 U. S. 342 (1944) 10

Salvado v. Prudential Property and Casualty Insurance Company, 287 Pa. Super. 304, 438 A. 2d 297 (1981) 17

Schmucker v. Naugle, 426 Pa. 203 (1967) 16

Sgambati v. United States, 172 F. 2d 297 (2d Cir. 1949), *cert. denied*, 337 U. S. 938 (1949) 12

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Stein v. The Washington Hospital, — Pa. Super. —, 448 A. 2d 558 (1982) 16
Street v. New York, 394 U. S. 576 (1969) 7
United States v. Glenn, 231 F. 2d 884 (9th Cir. 1956), *cert. denied*, 352 U. S. 926 (1956) 13
United States v. Kubrick, 444 U. S. 111 (1979) 10
United States v. Fruehauf, 365 U. S. 146 (1961) 9
Vance v. Vance, 108 U. S. 514 (1883) 11, 12
Von Colln v. Pennsylvania Railroad Company, 367 Pa. 232 (1951) 16
Walters v. Ditzler, 424 Pa. 445 (1967) 16
Williams v. United States, 133 F. Supp. 317 (E. D. Va. 1954) 12
Wood v. Carpenter, 101 U. S. 135 (1879) 10

Statutes:

42 Pa. C. S. A. § 5524(2) 1, 9
42 Pa. C. S. A. § 5533 ..... 1, 7, 9, 14, 16
42 Pa. C. S. A. § 6704(e) 14
40 P. S. § 1009.101 et seq. 17
40 P. S. § 1009.102(a)(5) 19
40 P. S. § 1009.103 17
40 P. S. § 1009.106(c) 17, 18
28 U. S. C. § 1257(2) 7
28 U. S. C. § 2401 10
28 U. S. C. § 2401(b) 12
Act of June 24, 1895, T. L. 236 16

Rules:

U. S. Supreme Court Rule 16.1(b) 1
Pa. R. C. P. 2027 16
Pa. R. C. P. 2026 16

Miscellaneous:

Notice to the Bar, 271 Pa. 587, 419 A. 2d 182 (1979) 9

STATUTES AND PROCEDURAL RULES INVOLVED

42 Pa. C. S. A. § 5524(2) provides as follows:

> "The following actions and proceedings must be commenced within two years: . . .
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another."

42 Pa. C. S. A. § 5533 provides as follows:

> "Except as otherwise provided by Statute, infancy, insanity or imprisonment do not extend the time limited by this subchapter for the commencement of a matter."

MOTION TO DISMISS APPEAL

Pursuant to Rule 16.1(b) of the revised Rules of this Court, Lower Bucks County Hospital, Appellee, moves that this appeal be dismissed.

STATEMENT OF THE CASE

Procedural History

Appellant commenced this action on June 13, 1977 by filing a "Notice of Complaint" with the Administrator of the Health Care Services Malpractice Act for the Commonwealth of Pennsylvania. The case was transferred to the Bucks County Court of Common Pleas and a Complaint in Trespass was filed on August 1, 1977. Appellant alleged that Michelle Dyer was born on September 5, 1972 at Lower Bucks County Hospital (hereinafter "Hospital") and that on September 6, 1972, while in the Hospital, she received second and third degree burns on her chest and stomach. A derivative claim was filed by Ruby Dyer for various expenses relating to the care and treatment of her daughter, Michelle Dyer. On September 13, 1977, appellee filed an Answer denying all allegations of negligence and in New Matter asserted the affirmative defense of the statute of limitations. On September 30, 1977, appellant filed a Reply to New Matter denying that the cause of action was barred by the applicable statute of limitations. The Reply to New Matter never denied, disputed or otherwise challenged the applicability of the statute of limitations on a constitutional basis. There were no other pleadings filed in the case.

On September 17, 1980, after discovery had been completed, appellee filed a Motion for Summary Judgment which was answered on November 5, 1980. Appellee filed a Memorandum of Law in support of this motion and on December 2, 1980, the Honorable Isaac S. Garb, Bucks County Court of Common Pleas, entered summary judgment in favor of the Hospital (Appendix A15).

On December 9, 1980, appellant filed a Motion to Vacate the Order of Summary Judgment in order to take

additional discovery and to file affidavits in opposition to the Motion. On December 29, 1980, the Bucks County Court of Common Pleas vacated its December 2, 1980 Summary Judgment Order and granted appellant 60 days to take additional discovery.

Appellant took no additional discovery and did not present any affidavits during the sixty day period. On April 13, 1981, appellee filed a Motion to Reinstate Summary Judgment with a supporting Memorandum of Law. Numerous supplemental and rebuttal memoranda of law were filed by both parties. On July 16, 1981, the Honorable Isaac S. Garb again entered Summary Judgment in favor of appellee (Appendix A19).

Appellant timely appealed to the Pennsylvania Superior Court and appellee filed a Motion to Quash because appellant included in the appellate record certain medical records which were not part of the record in the court below. The Superior Court denied the Motion to Quash but granted appellee's motion to strike the aforesaid portions of the medical record (Appendix A20). Nevertheless, appellant ignored the Superior Court's order striking non-record material from the appellate record and included it in its subsequent Petition for Allowance of Appeal to the Pennsylvania Supreme Court and in this Appeal.

The Pennsylvania Superior Court by Memorandum Opinion and Order dated March 19, 1982, affirmed the decision of the Court of Common Pleas and the entry of Summary Judgment in favor of appellee (Appendix A3). Appellant timely filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court and on August 10, 1982 the petition was denied. This Appeal followed.

Factual History

Michelle Dyer was born on September 5, 1972 at Lower Bucks County Hospital. As a result of serious life

threatening medical conditions of a respiratory nature, she was transferred to Thomas Jefferson University Hospital (hereinafter "Jefferson") on September 6, 1972. Ruby Dyer testified that within twenty-four hours after the child's birth and ten minutes before her transfer to Jefferson a physician at the Hospital told her that the Michelle Dyer had an allergic or chemical reaction to a gel used in connection with a fetal monitor which was in use because of the infant's respiratory difficulties.

Michelle Dyer was hospitalized at Jefferson on September 6, 1972 and was a patient there until November 23, 1972. Ruby Dyer testified that she observed the condition of the minor plaintiff's chest when the girl was discharged from Jefferson in November, 1972. She described the baby's chest as having a rash over the entire breastbone area with raised white pimples. Ruby Dyer stated that *she* explained to a physician at Jefferson that this was caused by the reaction to the electrode gel at the Hospital.

The child was subsequently re-admitted to Jefferson on December 12, 1972. Ruby Dyer testified that during the interim between the first and second admission the child's condition did not change. She further testified that she took her daughter to Jefferson for the second admission and recalled giving a medical history to a doctor which states that Michelle Dyer received chest scars from an electrode gel. Furthermore, the child's mother testified she spoke with Dr. Patricia Camody-Johnston, a pediatrician at Jefferson, during this second admission and told her about the incident with the electrode gel at the Hospital. Significantly, Dyer testified that sometime between December 12, 1972 and December 22, 1972 Jefferson personnel told *her* that the child had *chest burns.*

The record discloses that Ruby Dyer knew that the condition of her child's chest was associated with events which occurred in 1972. It reads as follows:

Question: As of the time you talked to this physician about ten minutes before your daughter was transferred from Lower Bucks to Jefferson, you knew then didn't you, that whatever was the condition of her skin on her chest, it was caused by something that happened while she was at Lower Bucks?

Answer: Right.

Question: And that condition of her chest, at least as you understood it, was not a normal condition that a newborn should have; correct?

Answer: Correct.

Question: And you knew that right at the time she was transferred from Lower Bucks to Jefferson; correct?

Answer: Correct.

Question: You had had another daughter, as a matter of fact, and knew that's just not what a normal baby's chest looks like?

Answer: Right.

Question: And you were, at least at that point, suspicious of why something like that would happen to a newborn child?

Answer: I was told what happened.

Question: Right at the time she was transferred?

Answer: Right.

(Appendix A23-A24)

It is undisputed that appellant first consulted a lawyer in June, 1977. Ruby Dyer's stated reasons for seeking

counsel at that time included: (1) her parents were "getting on" her and repeatedly mentioning the condition of the child's chest; and (2) it appeared that the scars were growing. After seeing her attorney, the minor appellant was referred to a plastic surgeon, Dr. Albert Davne, who advised Ruby Dyer that the child had second and third degree burns on her chest. Ruby Dyer testified that prior to this *she knew the child had burns,* but did not know the extent of them.

ARGUMENT

I. Appellant Has Not Properly Raised a Federal Question.

The Appellant's jurisdictional basis for this appeal is based on 28 U. S. C. § 1257(2). This statute reads as follows:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution treaties or laws of the United States, and the decision is in favor of its validity."

In this case, the appellant has simply argued that 42 Pa. C. S. A. 5533 is unconstitutional as applied to Michelle Dyer (Appellant's Jurisdictional Statement p. 14 and Pennsylvania Superior Court Opinion).[1] The record and Appellant's Jurisdictional Statement do not raise a question as to the validity of the Pennsylvania Statute of Limitations on its face. Indeed, Appellant has raised no question as to the validity of the statute; but is only disturbed by its application to the facts of this case. Thus, this Court does not have jurisdiction pursuant to 28 U. S. C. 1257(2).

Likewise, appellant has failed to properly raise and submit a federal question for appeal. Whether or not a federal question is duly raised is itself a federal question for the United States Supreme Court to decide. *Street v. New York*, 394 U. S. 576, 583-584 (1969), *Honeyman v. Hanan*, 300 U. S. 14, 18 (1937).

It is not at all clear that the appellant raised an issue under the United States Constitution in the courts below. No reference whatsoever is made to the United States

1. *See*: Pennsylvania Superior Court Memorandum Opinion, Appendix, A7.

Constitution in any of the pleadings. Although acknowledging that the issue was raised, the Pennsylvania Superior Court's Memorandum Opinion does not distinguish in any way between the United States Constitution and the Pennsylvania Constitution.

Indeed, in the courts below, appellant relied upon *Carson v. Maurer,* 424 A. 2d 825 (N. H. 1980) which was specifically decided on the basis of the New Hampshire State Constitution and not on the United States Constitution. *Carson v. Maurer, supra* 831 explicitly recognized that the United States Supreme Court has restricted application of the substantial relationship test to classifications based on gender and illegitimacy. The New Hampshire Supreme Court did not find a similar restriction in its State Constitution. Likewise, in the instant case it is not clear if the Pennsylvania Superior Court considered the case under the Constitution of the Commonwealth of Pennsylvania or the United States Constitution. Thus, it is respectfully submitted that appellant has not properly raised a question under the United States Constitution.

II. The Issue Raised by Appellant Was Not Expressly Decided by the Pennsylvania Supreme Court.

It is further respectfully submitted that there is nothing in this record for the United States Supreme Court to review because there is no decision of the highest court of the Commonwealth of Pennsylvania. Generally, where the highest State Court could hear a matter and declines to do so, this is treated as a final decision. *Gallick v. Baltimore and Ohio Railroad Company,* 372 U. S. 108, 109 (1963). However, in this case, the Pennsylvania Superior Court entered a "Memorandum Opinion and Order" and the Pennsylvania Supreme Court declined to review the matter.

A Memorandum Opinion is a peculiar creature of Pennsylvania appellate practice in that it has no precedential weight and is not to be cited for any purpose. *K. N. v. Cades,* 288 Pa. Super. 555, 432 A. 2d 1010 (1981), *see also*: Notice to the Bar, 271 Pa. 587, 419 A. 2d 182 (1979). Consequently, if the appeal is accepted, this Court would be put in the position of rendering an advisory opinion on a matter which carries no precedential weight in the Commonwealth of Pennsylvania. This Court has a firm policy of refusing to render advisory opinions. *United States v. Fruehauf,* 365 U. S. 146, 157 (1961).

III. The Federal Question Presented Is Not Substantial.

In this case, the Pennsylvania courts applied 42 Pa. C. S. A. § 5524(2) which provides that an action for personal injury must be brought within two years of the events that gave rise to the cause of action. The statute provides:

> "The following actions and proceedings must be commenced within two years: . . . (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another." 42 Pa. C. S. A. § 5524(2).

There is no saving provision in the Pennsylvania Statute of Limitations suspending the running of the statute of limitations as to a minor. To the contrary, the applicable law explicitly states:

> "Except as otherwise provided by Statute, infancy, insanity or imprisonment does not extend the time limited by this subchapter for the commencement of a matter." 42 Pa. C. S. A. § 5533.

However, in tort cases, Pennsylvania courts consider the applicability of the so called "discovery rule" in dealing with the statute of limitations. In essence, this rule states that the statute of limitations will not commence to run until the plaintiff discovers or should have discovered the cause of harm or injury. The courts below considered the applicability of the "discovery rule" to the facts of this case and rejected it. In *United States v. Kubrick*, 444 U. S. 111 (1979), this Court considered the same issue in the context of the Federal Tort Claims Act (F. T. C. A.) and 28 U. S. C. § 2401 which bars an action against the United States unless presented in writing to the appropriate federal agency within two years after such claim accrues. In reversing the Third Circuit, this Court noted:

> "Statutes of Limitations, which 'are found and approved in all systems of enlightened jurisprudence,' *Wood v. Carpenter*, 101 U. S. 135, 139 (1879), represent a persuasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specific period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' *Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 349 (1944). These enactments are Statutes of Repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." 444 U. S. at 117.

Thus, this Court in effect held that the plaintiff's cause of action in *Kubrick* was barred because he did not

file the action within two years of the time he discovered or should have discovered the cause of the alleged malpractice. *Id.* at 115. The Pennsylvania Superior Court in this case concluded that the appellant had sufficient factual information *within* the statutory period and declined to apply the discovery rule to toll the statute of limitations.

This Court has uniformly adopted the position that statutes of limitation go to matters of remedy and as a matter of Constitutional Law, are not destructive of fundamental rights. In short, the enactment of a statute of limitations is a matter of legislative prerogative and is a proper exercise of the sovereign's powers. *Atchafalaya Land Company v. F. B. Williams Cypress Company,* 258 U. S. 190, 197 (1922). So long as the statute of limitations provides a reasonable time for the enforcement of an existing cause of action it does not violate the Fourteenth Amendment. *Mattson v. Department of Labor and Industries of Washington,* 293 U. S. 151, 154-155 (1934).

The exact Constitutional issue raised by the appellant was decided by this Court one hundred years ago and it has not waivered from its course since that time. In *Vance v. Vance,* 108 U. S. 514, 521 (1883), this court was asked to set aside the judgment of the Louisiana Supreme Court concerning the distribution and accounting in a probate matter with reference to the applicable statute of limitations on the grounds that it was unconstitutional with respect to minors. The Court's holding specifically rejected this argument. This Court opined:

> "It is urged that because the plaintiff in error was a minor when this law went into operation, it can not effect her rights. But the Constitution of the United States, to which appeal is made in this

> case, gives to minors no special right beyond others, and it was within the legislative competency of the State of Louisiana to make exceptions to their favor or not. The exemptions from the operation of statutes of limitations usually accorded to infants and married women do not rest upon any general doctrine of the law that they can not be subjected to the action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coveture, to assert their rights.
>
> . . .
>
> If the aforegoing considerations be sound, they answer also effectually the suggestion in regard to the fourteenth amendment of the Constitution of the United States." *Vance v. Vance, supra* 521-522. *In accord: Murray v. City of Milford, Connecticut,* 380 F.2d 468, 473 (2d Cir. 1967).

Likewise, in *Pittman v. United States,* 210 F. Supp. 763, 764 (N. D. Calif. 1962), aff'd. 341 F. 2d 739, *cert. denied,* 382 U. S. 941 (1965) the court held that under the Federal Tort Claims Act infants are not accorded any special exemptions because of a fundamental doctrine of law, but only if Congress expressly provides for it by statute. In other words, infants constitutionally may be put on the same footing as adults unless a special provision in the statute of limitations applies. *See also: Sgambati v. United States,* 172 F. 2d 297 (2d Cir. 1949) *cert. denied,* 337 U. S. 938 (1949); *Williams v. United States,* 133 F. Supp. 317, 319 (E. D. Va. 1954). If this Court were to hold otherwise, it would open the door for invalidating the Federal Tort Claims Act and 28 U. S. C. § 2401(b) which states that a tort claim against the United States must be presented in writing to the appro-

priate Federal agency within two years after it accrues or be forever barred. Minors are not exempted from this two year requirement. In short, the Federal Tort Claims Act does not toll the running of the statute of limitation on a tort claim during infancy even where the infant is unaware of his rights and no one brings an action on his behalf. *United States v. Glenn*, 231 F. 2d 884 (9th Cir. 1956), *cert. denied*, 352 U. S. 926 (1956), *Mann v. United States*, 399 F. 2d 672 (9th Cir. 1968).

It is only in exceptional circumstances that a statute of limitations comes in conflict with the Constitution. For example, where a statute of limitations discriminates between legitimate and illegitimate children and their right to bring a support and paternity action, the legislative prerogative runs afoul of the Equal Protection Clause. *Mills v. Habluetzel*, — U. S. — , 102 S. Ct. 1549 (1982). It is only this invidious discrimination without a reasonable justification in public policy that violates the Constitution. However, it should be emphasized that in holding unconstitutional a Texas Statute of Limitations discriminating between legitimate and illegitimate minors this Court noted:

> "The restrictions imposed by states to control problems of proof, like the restriction imposed by Texas in this case, often take the form of statutes of limitations. 'Statute of Limitations find their justification in necessity and convenience rather than in logic . . . . they are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.' *Chase Security Corporation v. Donaldson*, 325 U. S. 304, 314 (1945). Because such statutes 'are by definition arbitrary',

> *Id.*, they are best left to the legislative determination at control. Normally, therefore, States are free to set periods of limitation without fear of violating some provision of the Constitution. In this case, however, the limitation period enacted by the Texas legislature has the unusual effect of emasculating a right which the Equal Protection Clause requires the State to provide to illegitimate children." *Mills v. Habluetzel, supra,* 1556, n. 9.

A fair reading of *Mills,* is that the statute was unconstitutional not because it ran against a minor but because it unfairly discriminated between legitimate and illegitimate children providing the latter with an unreasonably short time in which to bring an action.[2]

What is at issue in the case at bar in no way involves invidious discrimination under the Equal Protection Clause or the Due Process Clause. All minors are treated equally under 42 Pa. C. S. A. § 5533. Appellee would brush aside the established Constitutional law that statutes of limitations are matters of legislative prerogative. In support of this position, appellant relies on dictum in *DeSantis v. Yaw,* 290 Pa. Super. 535, 434 A. 2d 1273 (1981) suggesting that the statute of limitations in a personal injury

2. In *Astemborski v. Susmarski,* 22 W. D. Appeal DKT 1982 (Pa. Supreme Court) Slip Opinion, November 4, 1982 the court applied *Mills v. Habluetzel, supra* and held constitutional a statute of limitations requiring that actions to establish the paternity of a child born out of wedlock be commenced within six years of the birth of the child. The equal protection clause was not violated even though 42 Pa. C. S. A. § 6704(e) resulted in there being greater impediments in obtaining support for an illegitimate child than for one born in wedlock. The reason was that the 6 year period was sufficiently long to give those with an interest in such children time to assert a claim and the limitation was related to a legitimate state interest in avoiding the litigation of stale claims.

action involving a minor should be suspended until majority is reached. However, in presenting this argument the appellant ignores well established authority. Appellant is unable to cite any Pennsylvania case, federal court case applying Pennsylvania law or federal case holding that a statute of limitations is unconstitutional because it runs against a minor. Quite to the contrary, *DeSantis v. Yaw, supra, holds* that infancy does not toll a statute of limitations. The Pennsylvania Superior Court has recently affirmed this position. In *Petri v. Smith* (Pa. Superior Court), No. 1968 Phila. 1981, Slip Opinion October 22, 1982 the court held:

> "The second ground of error proposed by the appellant asks us to consider the constitutionality of Pennsylvania's statute of limitations in personal injury cases where minors are concerned. The thrust of appellant's argument is that the statute of limitations, which holds minors accountable equally with adults, violates a minor's equal protection and due process rights. Appellant avers that although her right to file this action is properly a jury question, Kenneth's right is not. She contends that, because Kenneth is less than eighteen years of age, under no circumstances should he be barred from bringing suit.
>
> The merits of appellant's constitutional arguments on this issue were recently discussed at length in *DeSantis v. Yaw*, 290 Pa. Super. 535, 434 A. 2d 1273 (1981). Two members of this panel participated in that comprehensive and scholarly opinion, and their view seriously questioning the rationale of barring personal injury suits by minors on a statute of limitations basis is well expressed therein. As the *DeSantis* majority observed, however, the settled rule in Pennsylvania is that it is not violative of any con-

stitutional rights to hold minors bound equally with adults to the prescribed statutory periods within which legal causes of action may be brought. This settled rule was most recently upheld by this Court in *Stein v. The Washington Hospital,* — Pa. Super. —, 448 A. 2d 558 (1982), filed July 16, 1982, wherein the Court *en banc* observed 'we are . . . obliged to hold that a child's cause of action is barred by the statute of limitations when it is not timely filed . . .' slip opinion at 23, n. 7. The appellant's argument in this respect, therefore, is without merit." *Petri v. Smith, supra,* 12-13.

DeSantis recognized that 42 Pa. C. S. A. § 5533 is nothing more than a codification of the Act of June 24, 1895, T. L. 236, and that since 1899 the courts have constitutionally applied it to minors. *Walters v. Ditzler,* 424 Pa. 445 (1967); *Schmucker v. Naugle,* 426 Pa. 203 (1967); *Von Colln v. Pennsylvania Railroad Company,* 367 Pa. 232 (1951); *Peterson v. Delaware River Ferry Company of New Jersey,* 190 Pa. 364 (1899). Appellant's argument on the statute of limitations misses the point. The minor plaintiff's mother could have brought this action on behalf of the minor within the statutory period.[3] There is nothing in the record to support appellant's assertions that Ruby Dyer, the child's natural mother, was immature or incompetent. Likewise, the minor's father was competent to bring the action. John M. Dyer and Ruby Dyer were married and living together when the minor-appellant was born.[4]

3. Indeed, Pennsylvania Rule of Civil Procedure 2027 provides that "when a minor is party to an action he shall be represented by a *guardian* who shall supervise and control the conduct of the action in behalf of the minor."

4. In addition to Ruby Dyer and John M. Dyer being competent to bring this action, Pa. R. C. P. Rule 2026 provides that a

Appellants suggest that the Pennsylvania Statute of Limitations is unconstitutional because it discriminates between minors injured in an automobile accident and those injured by alleged malpractice or any other way by citing Pennsylvania's mandatory No-Fault Law.[5] This argument is invalid. The only time the statute is tolled under the No-Fault Act is with respect to a minor's claim for benefits from *his own insurance carrier* (i.e., so called personal injury protection or P. I. P. benefits). The two year statute applies in all other cases including those

4. (Cont'd.)

"guardian" may be someone appointed by the Court, a guardian ad litem and/or a person in the nature of a next friend selected to represent the minor. This would include the grandparents with whom the child resided some of the time.

5. The Pennsylvania No-Fault Motor Vehicle Insurance Act 40 P. S. § 1009.101 et seq. contains a provision entitled "Time Limitation on Actions to Recover Benefits" 40 P. S. § 1009.106(c). In relevant part it states:

> "If a person entitled to no-fault benefits is under a legal disability when the right to bring an action for benefits first accrues, the period of his disability is not a part of the time limited for commencement of the action."

This exception from the general statute of limitations in Pennsylvania is limited to the statutorily defined no-fault benefits which means basic loss benefits, added loss benefits or both. 40 P. S. § 1009.103. Basic loss benefits cover wage loss and medical expenses incurred as a result of a automobile accident *payable by an insurance company to its policy holder regardless of who was negligent* in an automobile accident. In *Salvado v. Prudential Property and Casualty Insurance Company*, 287 Pa. Super. 304, 438 A. 2d 297 (1981) the Pennsylvania Superior Court recognized that this language can only be interpreted to mean that the legislature had carved an exception to the general statute of limitations contained in the No-Fault Act. This clear expression of legislative intent was in no way related to any finding that the Fourteenth Amendment or Pennsylvania Constitution had been in any way violated. Indeed, the No Fault Act leaves intact the parent or guardian's right to bring the action on behalf of the minor.

against *third party tortfeasors.* In this regard, all minors are treated exactly the same whether injury is from an automobile accident, by alleged medical malpractice, a defective product or some other way.

Any argument by the appellant that she has been denied Equal Protection under the United States Constitution because infancy does not toll the statute of limitations in this case while it does so in automobile cases for benefits against an insurance company is simply incorrect. The No Fault Provisions are completely consistent with precedent in the United States Supreme Court which says that state legislatures and Congress may determine whether a minor should be excepted from general statute of limitations. *Mills v. Habuletzel, supra,* recognized this in noting that the statute of limitation in paternity cases was one of the few that did not toll the statute as to minors. *Mills v. Habuletzel, supra,* 1557 (concurring opinion by Justice O'Connor). There is no suggestion that Texas acted unconstitutionally in tolling the statute of limitations for minors in certain types of cases and not others.

Indeed, there is a legitimate state interest for tolling the statute as to minors in certain cases but not in others.[6] For example, the Pennsylvania No-Fault Act tolls the statute of limitations as to minors in a very limited way. It deals *only* with claims brought by an insured against *his own* insurance company to pay for immediate wage loss and medical bills incurred as a result of the automobile accident. In effect, it is an expression of public policy that injuries from an automobile accident can be devastating both physically and financially. In light of this, the tolling of the statute of limitations achieves the legis-

6. It should be noted that this grace in the No Fault Act applies to all legal disabilities and not simply minors. 40 P. S. 1009.106(c).

lative goal of insuring that every victim of an automobile accident will have a means to pay for basic medical and rehabilitative costs along with a reasonable recovery for work loss without the need to prove fault on the part of a third party. 40 P. S. § 1009.102(a)(5). The statute is not tolled for a minor in any type of third party tort claim arising from the automobile accident.

In relying on *DeSantis v. Yaw, supra,* appellants have elected to ignore the public policy reasons behind the limited tolling of the No-Fault statute for a person with a legal disability injured in automobile accident while allowing it to run in all third party tort claims to be made by those with a legal disability. The Pennsylvania Superior Court in *DeSantis,* rejected the claim that the statute running against a minor is unconstitutional and noted that the legislature had made an exception to the statute of limitations because of the peculiar problem involved in automobile cases. *DeSantis v. Yaw,* 290 Pa. Super. 535, 434 A. 2d 1273, 1276, n. 8 (1981).

Based on the above authority, it is constitutionally adequate to say that the Pennsylvania General Assembly has provided no similar exception for minors injured in third party tort cases involving automobiles, products or medical malpractice. It is respectfully submitted that this Court should not question the wisdom and public policy behind that decision. Consequently, the federal question presented is not substantial.

CONCLUSION

Appellants make certain arguments, unsupported by the record, as to why this minor's action was not brought within the statutory period. Their arguments have been considered and rejected by the Court of Common Pleas of Bucks County, the Pennsylvania Superior Court, and the Pennsylvania Court. Appellants' dissatisfaction with these decisions does not rise to Constitutional levels. All minors are treated equally under the Pennsylvania Statute of Limitations and ample provision is made in the Pennsylvania rules of Court for insuring that the minors interests are adequately protected.

This appeal should be dismissed. For the reasons stated herein, the appellant has not presented a substantial federal question. Indeed, a federal question has not been properly raised nor decided by the Pennsylvania Supreme Court.

Respectfully submitted,

ALLAN H. STARR
JERROLD P. ANDERS
WHITE AND WILLIAMS
Attorneys for Appellee

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MARLENE F. LACHMAN, ESQ.
Prothonotary

468 City Hall
Philadelphia, 19107
(215) 496-4600

August 17, 1982

John P. Koopman, Esq.
S. Richard Klinges, III, Esq.
120 Mill Street
Bristol, Pa. 19007

Re: Michelle Dyer, a Minor v. Lower Bucks County Hospital
No. 233 E. D. Allocatur Docket 1982

Dear Mr. Koopman and Mr. Klinges:

This is to advise you that the following order has been endorsed on the Petition for Allowance of Appeal in the above-captioned matter:

August 10, 1982
Petition denied.
Per Curiam

Very truly yours,

/s/ MARLENE F. LACHMAN, ESQ.
Marlene F. Lachman, Esq.
Prothonotary

MFL:ejh
cc: Allan H. Starr, Esq.
LeRoy S. Zimmermann, Esq.

IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 2089 Philadelphia 1981

MICHELLE DYER, a minor by RUBY DYER,
her parent and natural guardian
Appellant

v.

LOWER BUCKS COUNTY HOSPITAL
Appellee

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY ENTERED JULY 16, 1981
IN CASE NO. 77-323-05-2, CIVIL ACTION—LAW

BEFORE: WIEAND, CIRILLO and POPOVICH, JJ.

(FILED MAR. 19, 1982)

PER CURIAM:

Order of the lower court is affirmed.

IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 2089 Philadelphia, 1981

MICHELLE DYER, a minor by RUBY DYER,
her parent and natural guardian
Appellant

v.

LOWER BUCKS COUNTY HOSPITAL
Appellee

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY ENTERED JULY 16, 1981
IN CASE NO. 77-323-05-2, CIVIL ACTION—LAW

BEFORE: WIEAND, CIRILLO and POPOVICH, JJ.

MEMORANDUM OPINION

This appeal is taken from the grant of summary judgment in favor of appellee, Lower Bucks County Hospital, and against appellant, Michelle Dyer, a minor, by Ruby Dyer, her parent and natural guardian. Appellant alleged medical malpractice by appellee because of burns she suffered as the result of an allergic or chemical reaction to a substance used in connection with an apena monitor placed on minor appellant's chest the day after her birth.

Appellant raises three issues: first, whether the grant of summary judgment in favor of appellee was proper; second, whether the statute of limitations of two years in a medical malpractice action was tolled, either by the "discovery rule", or the committment of fraud by the ap-

pellee; third, whether the statute of limitations can constitutionally bar a minor's suit in trespass.

> Summary judgment may only be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law'. Pa. R.C.P. 1035(b). On appeal, the record must be examined in the light most favorable to the non-moving party. *Keating v. Zemel* 281 Pa. Super. 129, 131, 421 A.2d 1181, 1182 (1980)

Because of the applicability of that standard in this case, we set forth the factual history based on the record as a whole.

Appellant, Michelle Dyer, was born prematurely on September 5, 1972 at Lower Bucks County Hospital, the appellee. Appellant was placed on an apena monitor because of cessations in her breathing processes. In light of her poor medical condition, appellant was transferred to Thomas Jefferson University Hospital (hereafter "Jefferson") on September 6, 1972, the day after her birth. Appellant's mother, Ruby Dyer, was told by a physician at appellee hospital, within twenty-four hours of appellant's birth, and within a few minutes of the appellant's transfer to Jefferson, that the minor appellant had suffered an allergic or chemical reaction to an electrode gel used in connection with the apena monitor. Appellant's mother observed the condition of minor appellant's chest after the minor's discharge from Jefferson on November 23, 1972. Appellant's chest had a rash with raised, white pimples over the entire breastbone area. On December 12, 1972, appellant was readmitted to Jefferson. Appel-

lant's mother explained to a physician at Jefferson what she had learned about the rash or scars from the physician at Lower Bucks County Hospital. She was told at Jefferson that the appellant had suffered burns on her chest. Additionally, during appellant's stay at Jefferson, appellant's mother observed a "pigskin" covering which was placed on appellant's chest because of these burns.

The lower court granted appellee's motion for summary judgment, because it found that the statute of limitations barred suit, based on the date of the complaint, that is, suit was not instituted until seven years after the alleged injury occurred. We agree with the lower court.

The applicable statute of limitations provides:

> that actions and proceedings must be commenced within two years:
>
> > . . . (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another. 42 Pa.C.S.A. § 5524(2).[1]

Appellant's mother was informed of the injury on September 6, 1972, but she did not file suit until August 1, 1977.

Appellant had raised the "discovery rule", that is, if appellant's mother did not discover the scars from the burns until the appellant was approximately three years old, then the two-year statute of limitations was not tolled until late 1975. The record does not support appellant's contention. The "discovery rule" has been held to mean that:

---

1. Prior law: 12 P. S. § 34. Additionally, the parties do not contest that the applicable statute of limitations is two years.

> the statute of limitations commences to run from the time plaintiff discovered or should have discovered the cause of harm or injury. *Acker v. Palena* 260 Pa. Super. 214, 219, 220, 393 A.2d 1230, 1232 (1978); citing, *Ayers v. Morgan* 397 Pa. 282, 289-90, 154 A.2d 788, 792 (1959).

The Supreme Court in *Ayers, supra,* at 290, held that:

> the injury is done when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable.

Construing the record, in the light most favorable to the appellant, the non-moving party, we believe that the filing of the complaint in trespass on August 1, 1977 was too late. Ruby Dyer, appellant's mother, had sufficient knowledge of the condition of her daughter's chest to initiate suit within the statutory period. The statute of limitations was not tolled, here, as in other cases, because of an unobservable or "inherently unknowable" injury. "Mere mistake, misunderstanding, or lack of knowledge do not toll the running of the statute of limitations." *Walters v. Ditzler* 424 Pa. 445, 449, 227 A.2d 833 (1967).

Appellant also contends that Lower Bucks County Hospital was fraudulent. The standard of fraud put forth in medical malpractice cases indicates that:

> . . . (b) through fraud, deception or concealment of facts, . . . a defendant lulls an injured person or his representative into a sense of security so that such person's vigilance is relaxed, then the defendant is estopped from evoking the statute . . . ; (c) the fraud which will toll the statute and effect an estoppel need not be fraud in the strictest sense, i.e., inclusive of an intent to deceive, but may be fraud in the broad sense i.e. inclusive of an unintentional deception. (citations omitted) *Walters, supra,* 449.

In this case, the injury was known to appellant's mother, Ruby Dyer, and there is no evidence that the physician at Lower Bucks County Hospital either intentionally deceived Ruby Dyer, or neglected to tell her of the appellant's injury and how it came about. Additionally, there is no allegation of fraud in the complaint, nor is there an allegation that the statute of limitations should not commence running as of September 6, 1972, the date of the injury, because of the alleged fraud.

Appellant has raised the issue of whether the statute of limitations, as applied to a minor, is constitutional. While it is true that "issues not raised in the lower court are waived and cannot be raised for the first time on appeal" (Pa. Rules of Appellate Procedure 302(a)), appellant raised the constitutional question in new matter contained in appellant's answer to appellee's motion for summary judgment, and, also, in her brief and reply brief.[2]

Even though the issue was raised, we find no merit in it because of the recent case of *DeSantis v. Yaw*, — Pa. Super. —, 434 A.2d 1273 (1981). There, this Court outlined the traditional and historical approach in this Commonwealth which has favored the application of the statute of limitations to minors. The minor appellant in *DeSantis* brought a suit in trespass for injuries she suffered in an automobile accident. The *DeSantis* court affirmed the holding that the statute of limitations which barred the minor's suit was constitutional. We agree with

2. The footnote to Pa. Rules of Appellate Procedure states that Rule 2117(c) (statement of place of raising or preservation of issues) and Rule 2119(e) (statement of place or preservation of issues) require that the brief expressly set forth in both the statement of the case and in the argument referenec to the place in the record where the issue presented for decision on appeal has been raised or preserved below.

the *DeSantis* court, and hold that the two year statute of limitations can constitutionally be applied against a minor in a medical malpractice case.

Order of the lower court is affirmed.

COURT OF COMMON PLEAS OF
BUCKS COUNTY—CIVIL

No. 77-7323-05-2

MICHELLE DYER, a minor, by RUBY DYER, her parent and natural guardian

v.

LOWER BUCKS COUNTY HOSPITAL

OPINION AND ORDER

This is a suit in trespass instituted on behalf of the minor plaintiff by her mother as her natural guardian against the defendant Lower Bucks County Hospital for certain injuries allegedly incurred by the minor plaintiff while a patient in said hospital. The pleadings are closed, interrogatories filed and answered, depositions have been taken and defendant has moved for summary judgment. Such will be granted.

Plaintiff was born at the defendant hospital on September 5, 1972 as a premature baby. On September 6, 1972 she was transferrd to Jefferson University Hospital for treatment and was never again treated either at defendant hospital or by its servants or agents. The complaint alleges that she suffered second and third degree burns to her chest as a result of the negligence of the defendant's agents on September 6, 1972. Suit was instituted by virtue of the filing of a complaint on August 1, 1977. Based upon the foregoing the defendant moves for

summary judgment based upon the applicable statute of limitations.[1]

Summary judgment can be granted only if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits which may have been filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Toth v. Philadelphia,* 213 Pa. Superior Ct. 282 (1968). The burden of demonstrating that no genuine issue of material fact exists is on the moving party and the record must be examined in a light most favorable to the non-moving party. *Schacter v. Albert,* 212 Pa. Superior Ct. 58 (1968). The court must accept as true all well pleaded facts in the non-moving party's pleadings and other proper evidence submitted in response to the motion, giving him the benefit of all reasonable inferences to be drawn therefrom. *McFadden v. American Oil Co.* 215 Pa. Superior Ct. 44 (1969); *Ro-Med Construction Co., Inc. v. Clyde M. Bartley Co., Inc.* 411 A.2d 790 (Pa. Superior Ct. 1979) and *LeGrand v. Lincoln Lines, Inc.* 384 A.2d 955 (Pa. Superior Ct. 1978). Obviously, the court cannot issue summary judgment where there is a material issue in dispute. *Younginger v. Heckler,* 410 A.2d 340 (Pa. Superior Ct. 1979).

The statute having to do with limitation of actions of this sort as effective at the time of institution of suit was the Act of June 24, 1895, P.L. 236, § 2, 12 P.S. § 34 which provided that such action "must be brought within two years from the time when the injury was done and not afterwards."[2] It is the duty of one asserting a cause

1. The bar of the statute of limitations was pleaded by defendant as new matter.

2. The Act of July 9, 1976, P. L. 586, No. 142, § 2, 42 Pa. C. S. A. § 5524(2), effective June 27, 1978 provides for the same period of limitations.

of action against another to use all reasonable diligence to inform himself properly of the facts and to institute the suit within the prescribed statutory period. *Patton v. Commonwealth Trust Company,* 276 Pa. 95 (1923) and *Turtzo v. Boyer,* 370 Pa. 526 (1952). Mere mistake, misunderstanding or lack of knowledge is not sufficient to toll the running of the statute. *Ridgway's Account,* 206 Pa. 587 (1903) and *Med-Mar, Inc. v. Dilworth,* 214 Pa. Superior Ct. 402 (1969). However, if the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitation does not begin to run until discovery of the injury is reasonably possible. *Gotshall v. Langdon & Company,* 16 Pa. Superior Ct. 158 (1901); *Lewey v. Fricke Coke Company,* 166 Pa. 536 (1895); *Smith v. Bell Telephone Company of Pennsylvania,* 397 Pa. 134 (1959). This was articulated in *Ayers v. Morgan,* 397 Pa. 282 (1959), a medical malpractice case and became known as the "discovery rule" with respect to the application of the appropriate statutes of limitations. Thus, Pennsylvania courts have repeatedly construed this statute of limitations as commencing to run from the time plaintiff discovered or should reasonably have discovered the cause of harm or injury. *Acker v. Palena,* 393 A.2d 1230 (Pa. Superior Ct. 1978). We read the statute of limitations in the light of reason and common sense, and therefore to the end that a plaintiff must know or reasonably be able to find out about the injury within the period of the statute. If such knowledge or opportunity therefore is not at hand, then the period will be extended by such time as passes until the knowledge manifests itself, or reasonably could be found before the bar of the statute of limitations falls. *Armacost v. Winters,* 258 Pa. Superior Ct. 424 (1978).[3]

3. In a remarkably similar case, see: *Stein v. Richardson,* 419 A. 2d 1374 (Pa. Superior Ct. 1980).

When applied to the facts of this case it is clear that the statute is a bar to this law suit. The plaintiff was born on September 5, 1972 as a premature baby which necessitated certain medical procedures at the defendant's hospital. Among those procedures was the use of a monitor to signal when she stopped breathing. The monitor was attached to the plaintiff's chest and a certain gel was used and was applied to the monitor and that portion of the plaintiff's chest to which the monitor was attached. On September 6, 1972 the monitor had been removed and the plaintiff was moved to Jefferson Hospital in Philadelphia for further treatment. She never again returned to the defendant hospital nor did she receive any treatment or services from any of its agents, servants or employees. Therefore, the cause of action asserted in this case obviously arose no later than September 6, 1972 and the question is whether whatever her condition or injury was, it was or should reasonably have been ascertained within two years of the date on which the suit was started, August 1, 1977.

Plaintiff's mother testified at deposition that she did not see the plaintiff's chest at any time after she was born and before she was taken to Jefferson Hospital. However, she did testify that approximately ten minutes before the plaintiff was taken to Jefferson Hospital that she was told by a doctor that the plaintiff was allergic to some chemical in a jelly used for a cardiogram. She further testified that she visited the plaintiff at Jefferson Hospital and observed that a "pigskin" was over the plaintiff's chest. The plaintiff was in Jefferson Hospital on that occasion five or six weeks, during which time she never saw the plaintiff's chest but did observe the "pigskin" on her chest. She first observed the plaintiff's chest when she took her home from Jefferson Hospital at which time her

chest appeared to be covered by a rash. The rash was red and it covered the entire center of her chest from the top of the breast bone to the bottom and over the entire portion of the chest where the nipples would be found. In addition to its coloration she observed that that area was covered with pimples. The foregoing condition remained essentially the same at those times when plaintiff's mother observed them until approximately two or two and a half years later when she observed that that area of her chest had developed a scar. She observed this in approximately 1974 or early 1975. She did nothing about the foregoing although she was aware of the fact that this condition had persisted for several years and in fact did nothing at all until 1977 when she observed that the scar seemed to be growing with the child and the plaintiff's mother's parents insisted that she see an attorney. In 1977 for the first time she consulted an attorney who referred her to a plastic surgeon. That plastic surgeon was the first physician she consulted regarding her daughter's condition with respect to her chest. The record reveals that the plastic surgeon then diagnosed the plaintiff's condition as having resulted from second to third degree burns.

We believe that the foregoing graphically demonstrates that the plaintiff's mother was fully aware that something may have happened to the child while in Lower Bucks Hospital on September 6, 1972 and was aware of the fact that she was suffering from some condition of her chest as a result of her observing the "pigskin" covering while the child was a patient at Jefferson Hospital. From the time she took the plaintiff home sometime in the Fall of 1972 she observed this unusual rash and pimplelike condition covering most of her chest and breast. She continued to observe that condition unabated for a period of three or four years as it developed, ultimately,

into a scar covering most of her chest. She did nothing about this. Quite obviously, she had reasonable knowledge that something was amiss as early as late 1972 but opted to do nothing about it until 1977. We believe, based on these facts, that this suit is barred by the applicable statute of limitations.

ORDER

AND NOW, to wit, this 2nd day of December 1980, it is hereby ordered, directed and decreed that summary judgment be entered in favor of the defendant.

By the Court,

/s/ ISAAC S. GARB, *J.*

COURT OF COMMON PLEAS OF
BUCKS COUNTY—CIVIL

No. 77-7323-05-2

MICHELLE DYER, a minor by RUBY DYER,
her parent and natural guardian

v.

LOWER BUCKS COUNTY HOSPITAL

OPINION OF THE COURT

On December 2, 1980 by opinion and order we entered summary judgment in favor of the defendant in this medical malpractise action. On December 29, 1980 as a result of a rule to show cause entered on December 9, 1980 we entered an order vacating the order of summary judgment granting leave to the plaintiff for additional discovery for a period of sixty days. Additional discovery was pursued to some extent following which the defendant has once again moved for summary judgment. For the reasons set forth in our original opinion we hereby again render summary judgment for the defendant.

We incorporate herein by reference our original opinion together with the factual statement contained therein. Essentially plaintiff argues here that the applicable period of the statute of limitations should be tolled based upon the theory of fraud, deception or concealment by the agent of the defendant.[1] Plaintiff asserts

1. That theory is predicated upon certain statements allegedly made by a Dr. Flacco who was the treating pediatrician and who she alleges to be the servant or agent of the defendant. For purposes of our disposition herein we need not decide whether he was the agent of the defendant.

that the alleged fraud, deception or concealment of facts was established by the alleged statement made by Dr. Flacco to the effect that the minor plaintiff suffered from some rash or irritation to her chest caused by a jelly used to attach a heart monitor to her which rash or irritation would disappear. As we previously noted in our opinion, the so-called rash or irritation did not disappear but rather persisted and developed into a severe scarring of most of the minor plaintiff's chest and continued in that condition until 1977 when the minor plaintiff's mother eventually consulted counsel and then, for the first time, medical advice.

As stated in *Acker v. Palena*, 393 A. 2d 1230 (Pa. Superior Ct. 1978) the fraud which will toll the statute and effect an estoppel need not be fraud in the strictest sense, i.e., inclusive of an intent to deceive, but may be fraud in the broad sense, i. e., inclusive of an unintentional deception. However, the application of that theory of tolling the statute as applied in *Acker v. Palena, supra*, and *Walters v. Ditzler*, 424 Pa. 445 (1967), upon which it relies, was based upon the fact that in each case the physician continued over an extended period of time treating the plaintiff at all times reassuring the plaintiff that the condition about which the plaintiff complained was natural and would ameliorate. Only after an extended course of treatment with the defendant physician in each case did the plaintiff seek other medical advice and discover, for the first time, the alleged acts of malpractice on the part of the treating physician. Here, Dr. Flacco made the one statement cited on the day after the minor plaintiff's birth on September 6, 1972 and never thereafter treated the minor plaintiff or communicated in any way with the plaintiff's mother. Thereafter the minor plaintiff was treated at Jefferson Medical Hospital by other physicians and for a period of several years was untreated

by anyone even while the mother continued to observe the condition as it grew progressively worse. Although the statement of Dr. Flacco may justly be sufficient to toll the period of the statute of limitations for some reasonable time thereafter, considering the obvious condition of the minor plaintiff over a period of five years thereafter, we are satisfied that the condition was, as it should have been, discovered by the mother and well beyond the time during which she had any justification for relying upon the statement of Dr. Flacco. Therefore, we are satisfied that this cause of action is barred by the applicable statute of limitations and summary judgment must be re-entered.

ORDER

And Now, to wit, this 16th day of July 1981, it is hereby ordered, directed and decreed that summary judgment be entered in favor of the defendant.

By the Court,

/s/ Isaac S. Garb, J.

THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PHILADELPHIA

J. HANIEL HENRY
Prothonotary
BEATRICE CURTISS
Deputy Prothonotary

2044 Old Federal Courthouse
Ninth and Chestnut Streets
Philadelphia, Pa. 19107
(215) 351-5800

December 3, 1981

Allan H. Starr, Esquire
1234 Market Street
17th Floor
Philadelphia, PA 19107

Re: Michelle Dyer, etc., Appellant v.
Lower Bucks County Hospital
No. 2089 Philadelphia, 1981

Dear Mr. Starr:

This is to advise that the following Order has been entered in the above-captioned matter:

"AND NOW, November 30, 1981, Appellee's motion to quash is denied without prejudice to its right to argue the appealability of this matter in its brief and at oral argument and without prejudice to appellee's right to present a self-sufficient, detailed motion for taxation of costs at the time of oral argument. Appellee's motion to strike non-record matters is granted. Appellant is hereby direct to delete all non-record

documents (Pa.R.A.P. 1921) from the reproduced record or risk sanctions.

s/ Per Curiam"

Very truly yours,

/s/ J. HANIEL HENRY
J. Haniel Henry
PROTHONOTARY

JHH:mlk
cc: S. Richard Klinges, III, Esquire

IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 2089 Philadelphia 1981

MICHELLE DYER, a minor by RUBY DYER,
her parent and natural guardian
Appellant

v.

LOWER BUCKS COUNTY HOSPITAL
Appellee

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Bucks County be, and the same is hereby AFFIRMED.

By THE COURT:

J. HANIEL HENRY
J. Haniel Henry
PROTHONOTARY

Dated: March 19, 1982

IN THE
SUPREME COURT OF PENNSYLVANIA

No. 233 E.D. ALLOCATUR DOCKET 1982

ATTORNEY I.D. #02022

MICHELLE DYER, a minor by RUBY DYER, her parent and natural guardian,

Petitioners

v.

LOWER BUCKS HOSPITAL,

Respondent

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that pursuant to 28 USCA § 1257(2), Michelle Dyer, a minor by Ruby Dyer, her parent and natural guardian, Petitioners above named, hereby appeal to the United States Supreme Court from the Order of the Pennsylvania Supreme Court entered on August 10, 1982 denying Petitioners' Petition for Allowance of Appeal to the Pennsylvania Supreme Court.

BY: EDWIN N. POPKIN
Edwin N. Popkin
BEGLEY, CARLIN & MANDIO
120 Mill Street
Bristol, PA 19007
(215) 788-0471
ATTORNEY FOR PETITIONERS

Received Oct. 29, 1982
Supreme Court Eastern District

PERTINENT PORTION OF DEPOSITION OF RUBY DYER

[48]

Q. As of the time you talked to this physician about ten minutes before your daughter was transferred from Lower Bucks to Jefferson, you knew then, didn't you, that whatever was the condition of her skin on her chest, it was caused by something that happened while she was at Lower Bucks?

A. Right.

Q. And that condition of her chest, at least as you understood it, was not a normal condition that a newborn should have; correct?

A. Correct.

Q. And you knew that right at the time she was transferred from Lower Bucks to Jefferson; correct?

[49]

A. Correct.

Q. You had had another daughter, as a matter of fact, and knew that's just not what a normal baby's chest looks like?

A. Right.

Q. Right at the time she was transferred?

A. Right.

SUPREME COURT RULE 16.1(b)

United States Supreme Court Rule 16.1(b) provides as follows:

> The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis."

28 U.S.C.§ 1257(2)

28 U.S.C. § 1257(2) provides as follows:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be be had, may be reviewed by the Supreme Court as follows:
>
> > (2) By appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

28 U.S.C. § 2401(b)

28 U.S.C. § 2401(b) provides as follows:

> "(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail of notice of final denial of the claim by the agency to which it was presented."

PENNSYLVANIA NO-FAULT MOTOR VEHICLE INSURANCE ACT

The Pennsylvania No-Fault Motor Vehicle Insurance Act of July 19, 1974, P.L. 489, No. 176, 40 P.S. § 1009.101 et seq. provides in the pertinent parts:

Sec. 103 Definitions

The pertinent part of the definition section concerning no-fault benefits provides as follows:

"No-fault benefits" means basic loss benefits, added loss benefits, or both."

Sec. 106(c) Time limitations on actions to recover benefits—

"(1) If no-fault benefits have not been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two years after the victim suffers the loss and either knows, or in the exercise of reasonable diligence should have known, that the loss was caused by the accident or not later than four years after the accident, whichever is earlier. If no-fault benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant; may be commenced not later than two years after the last payment of benefits.

(2) If no-fault benefits have not been paid to the deceased victim or his survivor or survivors, an action for survivor's benefits may be commenced not later than one year after the death or four years after the accident from which death results, whichever is earlier. If survivor's benefits have been paid to any survivor, an action for further survivor's benefits by

either the same or another claimant may be commenced not later than two years after the last payment of benefits. If no-fault benefits have been paid for loss suffered by a victim before his death resulting from the injury, an action for survivor's benefits may be commenced not later than one year after the death or six years after the last payment of benefits, whichever is earlier.

(3) If timely action for basic restoration benefits is commenced against an obligor and benefits are denied because of a determination that the obligor's coverage is not applicable to the claimant under the provisions of section 204 of this act, an action against the applicable obligor or the obligor to whom a claim is assigned under an assigned claims plan may be commenced not later than sixty days after the determination becomes final or the last date on which the action could otherwise have been commenced, whichever is later.

(4) Except as paragraph (1), (2), or (3) prescribes a longer period, an action by a claimant on an assigned claim which has been timely presented in accordance with the provisions of section 108(c) of this act may not be commenced more than sixty days after the claimant receives written notice of rejection of the claim by the restoration obligor to which it was assigned.

(5) If a person entitled to no-fault benefits is under a legal disability when the right to bring an action for the benefits first accrues, the period of his disability is not a part of the time limited for commencement of the action."

NOTICE TO THE BAR, 271 Pa. Super. 587 (1979)

Notice to the Bar, 271 Pa. Super. 587 (1979) provides as follows:

NOTICE TO THE BAR

"In the following cases decided by the Superior Court, the decision of the court below was affirmed per curiam. However, a memorandum opinion has been prepared and filed by the Superior court in most of these cases and copies of the memorandum opinion have been forwarded to the chief counsel for the parties and to the lower court. These memorandum opinions contain the rationale of the Superior Court in reaching its decision. Copies of these memorandum opinions may be procured by members of the Bar or any member of the public at the prothonotary's office of the Superior Court in the district in which the case arose. These memorandum opinions are not to be considered as precedent and cannot be cited for any purpose."

July 6, 1979.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543
November 18, 1982

Allan H. Starr, Esq.
White and Williams
1234 Market Street, 17th Floor
Philadelphia, Pennsylvania 19107

RE: Michelle Dyer, a minor by Ruby Dyer, her parent and natural guardian v. Lower Bucks County Hospital

No. 82-5714

Dear Mr. Starr:

Your request of November 16, 1982 for an extension of time within which to file a motion to dismiss or affirm the jurisdictional statement in the above-entitled case has been granted, and your time has been extended to and including December 20, 1982.

Very truly yours,

ALEXANDER L. STEVAS, Clerk
By /s/ CHRISTOPHER W. VASIL
Christopher W. Vasil
Deputy Clerk

gtb
cc: Edwin N. Popkin, Esq.
Leroy S. Zimmerman, Esq.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MICHELLE DYER, a minor by RUBY DYER
her parent and natural guardian
Appellants

v.

LOWER BUCKS COUNTY HOSPITAL
Appellee

PROOF OF SERVICE

I, ALLAN H. STARR hereby certify that copies of the foregoing Motion to Dismiss of Appellee were forwarded to the following persons, with first-class postage prepaid, by depositing the same in a United States post office or mailbox this 16th day of December, 1982, that said service is in accordance with Rule 28 of this court and that the persons listed constitute all parties required to be served:

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Edwin N. Popkin, Esquire
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Office of the Prothonotary
The Court of Common Pleas
for Bucks County
Bucks County Courthouse
Doylestown, PA 18901

WHITE AND WILLIAMS
Attorneys for Appellee

By _____
Allan H. Starr
Jerrold P. Anders